Supreme Court, U.S.
FILED

941620 MAR 29 1995

OFFICE OF THE CLERK

No. 94-___

In the

Supreme Court of the United States

October Term, 1994

WILLIAM E. KIRWAN, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

KEVIN T. BAINE
STEVEN M. FARINA
Williams & Connolly
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
RICHARD A. WEITZNER
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6330

**Counsel of Record*

Attorneys for Petitioners

38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourteenth Amendment prohibits a state university from spending one percent of its financial aid budget on a race-based merit scholarship program when (a) the university had been racially segregated for almost a century and actively resistant to integration for at least twenty years thereafter, (b) the program was part of a statewide response to the United States Department of Education's findings of discrimination in Maryland's entire higher education system, and (c) the program has no appreciable adverse effect on any student.

2. Whether this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), permits a university to advance its compelling interest in student diversity by adopting a race-based scholarship program that does not have any adverse impact on the admission of any student.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Daniel J. Podberesky (appellant below); William E. Kirwan, President of the University of Maryland at College Park; the University of Maryland at College Park; Monica Green; Maudlyn George, on her own behalf and on behalf of her daughter Allison George; Eileen Heath; Richard A. Dalgetty; Gerard W. Henry; Maisha Herren; Aletha S. McRae, on her own behalf and on behalf of her daughter Daletha McRae; and Charles L. Smith, III, on his own behalf and on behalf of his son Charles Smith, IV (appellees below).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

1. Proceedings Below 2

2. Statement Of Facts 6

a. Maryland's History Of Discrimination Against Blacks In Higher Education And At UMCP 6

b. The Banneker Program 11

REASONS FOR GRANTING THE WRIT 13

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SCHOOL DESEGREGATION DECISIONS AND MISCONSTRUES ITS AFFIRMATIVE ACTION DECISIONS 14

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND WITH THE RECENT POLICY GUIDANCE OF THE UNITED STATES DEPARTMENT OF EDUCATION 24

III. THE COURT OF APPEALS MISCONSTRUED THIS COURT'S DECISION IN *BAKKE* TO PROHIBIT THE USE OF RACE-BASED SCHOLARSHIPS TO ATTAIN A DIVERSE STUDENT BODY 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Richardson, 356 F.Supp. 92 (D.D.C.), *modified*, 480 F.2d 1159 (D.C.Cir. 1973) 9

Board of Educ. of Oklahoma City v. Dowell, 111 S.Ct. 630 (1991) 15

Brown v. Board of Education, 347 U.S. 483 (1954) 6,7

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) 25

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 15,17,22

Freeman v. Pitts, 112 S.Ct. 1430 (1992) 15

Fullilove v. Klutznick, 448 U.S. 448 (1980) . . . 18,19

Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986) 26

Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968) . . 15,17,21

Keyes v. School District No. 1, 413 U.S. 189 (1973) 15

Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) 25

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) . . . 21

Metro Broadcasting Inc. v. F.C.C., 497 U.S. 547 (1990) 19,27

Milliken v. Bradley, 433 U.S. 267 (1977) 15

Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974) 25

Palmer v. District Board of Trustees of St. Petersburg Junior College, 748 F.2d 595 (11th Cir. 1984) 26

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) . . . i,16,18,27,28

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985) 29

Sheet Metal Workers v. E.E.O.C., 478 U.S. 421 (1986) 21,23,25

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 15-17,21

Sweezy v. New Hampshire, 354 U.S. 234 (1957) . . 29

United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977) 16

United States v. Fordice, 112 S.Ct. 2727 (1992) 15,16,18,22

United States v. Paradise, 480 U.S. 149 (1987) 18-20

University of Maryland v. Murray, 169 Md. 478, 182 A. 590 (1936) 7

Valentine v. Smith, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981) 26

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 15,17,19,22

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS:

U.S. CONST.
Fourteenth Amendment i,2

28 U.S.C. § 1254(1) 2
42 U.S.C. § 1981 2,3
42 U.S.C. § 2000d 2,3
42 U.S.C. § 2000d-1 16

56 Fed. Reg. 64548 (1991) 13
59 Fed. Reg. 4271 (1994) 16
59 Fed. Reg. 8757 (1994) 13,26,28,29
34 C.F.R. § 100.3(b)(6)(i) 16
34 C.F.R. § 100.3(b)(6)(ii) 16
34 C.F.R. § 100.5(h) 16

Md. Educ. Code Ann.
§ 10-204 4
§ 11-105(e) 4
§ 12-106 4
§ 12-109 4

MISCELLANEOUS:

United States General Accounting Office, *Information on Minority-Targeted Scholarships*, January, 1994 13

"Minority Designated Scholarship Programs, A Compilation of Available Data on the Scope and Extent of Programs," American Council on Education, 1991 29

No. 94-_

In the

Supreme Court of the United States

October Term, 1994

WILLIAM E. KIRWAN, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

William E. Kirwan, President of the University of Maryland at College Park, and the University of Maryland at College Park (collectively "the University" or "UMCP") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The October 27, 1994 opinion of the United States Court of Appeals for the Fourth Circuit is reported at 38 F.3d 147 and is reproduced in the Appendix ("App.") at 1a-29a. The court of appeals' December 30, 1994 order denying petitioners' request for rehearing and suggestion

for rehearing in banc is reported at 46 F.3d 5 and is reproduced at App. 30a-33a. The November 22, 1993 opinion of the United States District Court for the District of Maryland is reported at 838 F.Supp. 1075 and is reproduced at App. 34a-95a. The January 31, 1992 opinion of the court of appeals is reported at 956 F.2d 52 and is reproduced at App. 96a-108a. The May 15, 1991 opinion of the district court is reported at 764 F.Supp. 364 and is reproduced at App. 109a-138a.

JURISDICTION

The court of appeals' opinion and judgment were entered on October 27, 1994. The order denying petitioners' timely filed petition for rehearing and suggestion for rehearing in banc was entered on December 30, 1994. This petition is filed within 90 days of that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 42 U.S.C § 1981. The text of these provisions is reproduced at App. 221a.

STATEMENT OF THE CASE

1. Proceedings Below.

This petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit, which prohibits the University of Maryland at College

Park from offering a blacks-only scholarship program to rectify present effects of its past discrimination against blacks and to achieve diversity in its student body.

Respondent Daniel J. Podberesky, an Hispanic student at UMCP, filed this lawsuit in June of 1990 in the United States District Court for the District of Maryland, claiming that the Benjamin Banneker Scholarship Program ("Banneker Program") violated his civil rights under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), the Fourteenth Amendment, and 42 U.S.C. § 1981. The district court initially granted summary judgment in favor of defendants in 1991. 764 F.Supp. 364 (D.Md. 1991) (App. 109a). The district court held that the Program was justified because it was implemented in response to findings of the Office for Civil Rights ("OCR") of the Department of Education, which determined that the State maintained a racially-segregated higher education system that had to be dismantled. The court also held that the Program was narrowly tailored to remedy the effects of the past discrimination. (App. 122a-133a.)

The court of appeals reversed. 956 F.2d 52 (4th Cir. 1992) (App. 96a.) The court stated that "[o]nce a court has determined that a state has proceeded upon strong evidence of discrimination in other than the immediate past, the inquiry into the legitimacy of a race-based classification turns to the state's basis for finding continuing effects of such past discrimination." (App. 104a.) The court remanded for a determination of whether there is "some present effect of . . . past discrimination that the program is designed to redress," and whether the Program is narrowly tailored to remedy that effect. (App. 106a.)

In response to the court of appeals' decision, the University initiated a fact-finding process, pursuant to its authority under Maryland law,[1] to determine whether to continue the Banneker Program. Following the submission of extensive evidentiary materials from a number of parties and a public hearing in which respondent's counsel participated, the University issued a 61-page Decision and Report on April 26, 1993. It found that there are present effects of both the University's and the State's past discrimination against blacks, and that the Banneker Program is narrowly tailored to remedy those present effects. (App. 139a.) The University also found that the Banneker Program directly advances the interest of promoting student diversity. (App. 213a.)

After several black students at the University intervened as defendants in the district court action and additional discovery was taken, the parties submitted cross-motions for summary judgment. The University submitted evidence of several continuing effects of its past discrimination, and also introduced affidavits of educators from across the country who emphasized the importance of race-based scholarships in attaining student diversity. Following a hearing, the district court granted summary judgment for the University. 838 F.Supp. 1075 (D.Md. 1993) (App. 34a).

The district court found it unnecessary to address the University's diversity argument because the court held that continuing effects of the University's past discrimination fully justified the Program. The court found the evidence offered in support of those present effects to be "succinct, startling and undisputed." (App.

---

[1] *See* Md. Educ. Code Ann. §§ 10-204; 11-105(e); 12-106 - 12-109 (1992 Repl.Vol., 1993 Cum.Supp.).

63a.) The district court first engaged in a thorough review of the history of the University's and the State's discriminatory treatment of blacks in higher education. (App. 36a-49a.) The court then found that the University had a "strong evidentiary basis" for finding four present effects of this unlawful discrimination: (1) a negative reputation in the black community, (2) an underrepresentation of blacks at the University, (3) low retention and graduation rates for blacks at the University, and (4) a campus climate hostile to blacks. (App. 51a-81a.) The district court concluded that the Banneker Program "serves to enhance UMCP's reputation in the African-American community, increase the number of African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus." (App. 83a.) The court also concluded that alternative programs were less effective than the Banneker Program, and that the program did not adversely affect the admission or scholarship opportunities of non-blacks. (App. 82a-88a.)

Podberesky appealed, and the court of appeals reversed. 38 F.3d 147 (4th Cir. 1994) (App. 1a) (*Podberesky II*). The court of appeals first noted that the Banneker Program, although adopted to remedy an undisputed history of discrimination, was "burdened with a presumption" of invalidity. (App. 6a.) The court then proceeded to reject as insufficient each of the four present effects advanced to support the program. The court held that the University's adverse reputation in the black community and the existence of a hostile campus climate for blacks could not, as a matter of law, justify a race-conscious remedy. (App. 9a-13a.) It then found that the district court erred in finding that there were no material factual disputes with respect to whether the other two

proffered effects -- underrepresentation and low retention and graduation rates -- were caused by prior discrimination. (App. 14a-18a.) Notwithstanding the court of appeals' finding that there were material factual disputes, however, the court directed the entry of summary judgment against the University on the ground that, assuming there were present effects of past discrimination, the Banneker Program was "not narrowly tailored" to remedy those effects. (App. 19a.)

The court of appeals did not address the University's request for a remand to enable the district court to address the University's diversity justification for the Banneker Program. By a vote of 8-3, the court of appeals denied the University's petition for rehearing and suggestion for rehearing in banc. (App. 30a.)

2. Statement Of Facts.

a. Maryland's History Of Discrimination Against Blacks In Higher Education And At UMCP.

Observing that "[t]he history of African-American higher education in Maryland before *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) is typical of most southern states" (App. 36a), the district court stated that "Maryland's policy towards the education of its black citizens was characterized by the reluctant establishment of institutions of higher education for blacks that were segregated, vastly underfunded and consistently neglected." (*Id.*) Instead of integrating or enhancing existing State institutions, the legislature allocated money to create scholarships for blacks to attend colleges outside of the State for undergraduate and graduate programs not available for blacks in Maryland.

See University of Maryland v. Murray, 169 Md. 478, 485, 182 A. 590, 593 (1936).[2] The awards were minimal, however, and most Maryland blacks were left with limited course offerings available at Maryland's four black colleges.

In 1945, the Maryland Commission on Higher Education "recommended that African-Americans be admitted to the state's all-white graduate schools and that funding for all-black colleges be increased to parity with that of the white schools." (App. 37a.) In response, Harry "Curley" Byrd, the president of UMCP, "agreed that funding should be equalized but was vehemently opposed to integrating the University's graduate and professional schools." (*Id.*) (footnote omitted).

Four years later, UMCP's president "recommended privatizing UMCP rather than allowing black graduate students to enroll there." (App. 38a) (footnote omitted). As the district court noted, his "suggestion was rejected and UMCP admitted its first black graduate student in 1951. Any further debate over the propriety of integrating the University of Maryland system was mooted by *Brown v. Board of Education*." (*Id.*) (footnote omitted).

After *Brown*, UMCP officials voted to remove the express restrictions on black enrollment, but the University remained resistant to desegregation measures and stayed virtually all white through the late 1960s. For example, UMCP officials imposed a number of requirements that "served to exclude African-Americans

---

[2] The plaintiff's attorney in this case was Thurgood Marshall, who previously had been denied admission to the University's law school solely because of his race.

who might have otherwise been admitted during the first years after *Brown*." (App. 38a-39a) (footnote omitted). "Similarly, in 1960, when the Governor proposed a complex plan to accommodate the growth of UMCP by converting several regional state colleges into additional branches of the flagship campus, no all-black colleges were considered for conversion, thus preserving the segregated character of College Park." (App. 39a) (footnote omitted). "Most importantly," the district court observed, "UMCP simply made no effort to recruit African-American students." (*Id.*) The campus climate for black students ranged from passively inhospitable to openly hostile. (App. 39a-40a.)[3] The result, the district court noted, was predictable: "[c]onsidering UMCP's institutional indifference to integration and the hostility of the campus climate, it is not surprising that black student enrollment stayed below 1% of the undergraduate population from 1954 until the end of the 1960s." (App. 40a.)

In 1969, the United States Department of Health, Education and Welfare's Office for Civil Rights ("OCR") found that the State of Maryland was operating a racially-segregated system of higher education in violation of Title

---

[3] The district court noted that "a faculty committee refused to allow students to form an on-campus chapter of the Congress for Racial Equality," that "the University discouraged Martin Luther King, Jr. from speaking on campus" but "permitted George Wallace," who "attracted the largest crowd in the history of the University," and that "[o]ff-campus housing was completely segregated and when an integrated dormitory was established for a summer 'citizenship' program in 1966, the Ku Klux Klan marched in protest." (App. 39a-40a.)

VI of the Civil Rights Act of 1964. (App. 110a.)[4] The State and the University began to take steps to desegregate, but OCR repeatedly found those measures to be insufficient. (App. 41a-46a.) As the district court explained, "the University's disinterest in attracting black students spilled over into the Admissions Office," the University was guilty of "financial neglect of the needs of African-American undergraduates," and "hostility toward minority recruitment existed at the highest levels of the University administration." (App. 43a.)[5]

In 1973, OCR found that the State "was not successfully desegregating UMCP," that "the colleges in the Maryland State University system still retained duplicative programs and that the areas of specialization at historically black colleges reflected stereotypical notions of what were considered appropriate careers for African-Americans." (App. 44a) (footnote omitted).[6] The district court also noted that even as a subsequent

---

[4] *See also Adams v. Richardson*, 356 F.Supp. 92, 94 (D.D.C.), *modified*, 480 F.2d 1159 (D.C.Cir. 1973).

[5] The district court noted that "[w]hen the Chancellor's Committee on Minority Education pressured UMCP to step up minority recruitment and retention efforts and to increase the amount of financial aid available to minority students, the administration dismissed the Committee's report as 'abusive, fuzzy, non-realistic and non-constructive' with recommendations that 'sound like a parody.'" (App. 43a-44a.)

[6] OCR found that in contrast to the doctoral and professional programs offered at UMCP and another historically white university, "the state's traditionally black colleges were given undergraduate programs designed to train their students to work within a population of criminals and persons with mental and physical deficiencies." (App. 44a.)

desegregation plan "was being implemented and as OCR developed criteria for Title VI compliance, the University took actions that hindered its own efforts at desegregation." (App. 46a.) "Not surprisingly, in 1978, after developing criteria for Title VI compliance, OCR once again concluded that Maryland was not taking sufficient action to desegregate its institutions of higher learning." (*Id.*) (footnote omitted).

Summarizing the University's pre-*Brown* and then post-*Brown* discrimination against blacks, the district court concluded that the University did not make any "genuine progress towards eliminating its single race status" until the late 1980s (App. 49a) (footnotes omitted):

> Whether manifested by the overtly racist comments of [former UMCP President] "Curley" Byrd, the absolute neglect of black recruiting during the sixties, the underfunding of African-American facilities, the institutional hostility towards the administrative units at UMCP responsible for desegregation, or the constant squabbling with the OCR, the University demonstrated at worst contempt for and at best grudging acceptance of its constitutional obligation to desegregate. It was only in the late 1970s, with the advent of the Banneker Program, that UMCP finally began to take meaningful steps towards integrating its campus. Indeed, it is only since the late 1980s that the University has made any genuine progress towards eliminating its single race status.

In 1985, pursuant to a court-approved agreement dismissing litigation between OCR and the State,[7] Maryland agreed to a five-year higher education desegregation plan. An approved component of that plan was the use of race-targeted scholarships, which included programs such as the Banneker Program. (App. 47a-48a.) Respondent applied for admission to the University in the last year of the plan.

The University is awaiting OCR's final determination whether the State has achieved compliance with federal law. As the district court noted, "the United States' amicus brief argues that Maryland still operates a dual system of higher education . . . ." (App. 48a n.42.)

b. The Banneker Program.

Facing continuing pressure from OCR, UMCP officials concluded in 1979 that a minority merit-based scholarship program was needed to change entrenched attendance and retention patterns of black students. The result was the Benjamin Banneker Scholarship Program. As one University official testified, "black high school students chose not to come to UMCP because of its history and reputation of segregation." (J.A. 3129.)[8] The Banneker Program was intended to help change the perception that blacks did not have successful experiences at UMCP, to improve the climate for black students, and ultimately to increase retention and graduation rates of all black students, not just those receiving the Banneker

---

[7] *Hughes v. United States Dept. of Education*, Civ. No. 76-01 (D.Md. June 3, 1985).

[8] References to "J.A." are to the Joint Appendix filed in this case with the Fourth Circuit.

awards. (J.A. 3089; 3130.)[9]

As the district court stated in its first decision, OCR not only was aware of the Banneker Program, but "in fact suggested expanding it in 1985." (App. 128a n.10.) The Program originally was open to all minority students with a strong emphasis on blacks, but few non-blacks received Banneker Scholarships and UMCP found that presenting the Program as open to minorities generally reduced its effectiveness in attracting black applications. The University in 1988 limited the Program to blacks to advance the Program's original purpose more effectively. (App. 48a n.41.)

Banneker scholarships offering full financial support are given to 20 to 30 entering students a year. As the district court noted, the 1985 desegregation plan that the State submitted to OCR "included specific reliance on the Benjamin Banneker Scholarship Program as one of UMCP's most important recruitment efforts." (App. 47a.)

---

[9] The Benjamin Banneker Scholarship Committee was formed in 1979 and developed selection criteria, which included not only GPA and SAT scores, but also consideration of extra-curricular activities, leadership experience, academic and career goals, and experiences with racism -- factors the Committee determined would best predict a black student's academic success at UMCP. (J.A. 3089-91.) These criteria corresponded with expert research conducted at UMCP regarding factors that predict success for black students at predominantly white institutions. (J.A. 1428-41.)

REASONS FOR GRANTING THE WRIT

This case presents issues of overriding legal and social significance that fundamentally affect higher education institutions across the nation. Numerous colleges and universities award race-exclusive scholarships, based on the same rationale as the University of Maryland's program, to more than 45,000 students annually. *See* 56 Fed. Reg. 64548 (1991).[10] The United States Department of Education just last year provided its strong endorsement of these programs in appropriate circumstances. *See* 59 Fed. Reg. 8757 (1994). Moreover, the Department's Office for Civil Rights played a crucial role in the implementation of the Banneker Program, and the Department of Justice defended the Program in the court below. The court of appeals' decision calls into question the validity of all such programs, as well as the policy of the Department of Education.

The widespread adoption of these programs, and the United States' endorsement of them nationally and in this case, reflect a recognition that race-based scholarships are of critical importance in eradicating the effects of past discrimination and in ensuring the benefits of a diverse student body. These programs advance the goal of equal educational opportunity at little or no cost to any value of constitutional dimension. As the district

---

[10] More than 60% of the country's undergraduate colleges and universities responding to surveys of the United States General Accounting Office and the American Council on Education indicated they award scholarships for which minority status is an eligibility requirement. *See* United States General Accounting Office, *Information on Minority-Targeted Scholarships*, January 1994, at 57 (Table III.2).

court noted, "[p]erhaps the greatest strength of the Banneker Program is that it is designed to remedy the effects of past injustices without interfering with the rights of others in the process." (App. 86a-87a.) "Banneker scholarships are awarded only after admission decisions are made, and they thus have no effect upon whether a student who is not African-American is able to attend UMCP." (App. 87a.) And because the program is a supplemental scholarship program supported by funds that would not be made available for other scholarship programs, no student "has suffered any appreciable monetary loss from the award of Banneker scholarships." (*Id.*) This program, which represents just one percent of the University's financial aid program, burdens no one, while at the same time providing a powerful incentive for high-achieving African-American students to accept the University's offer of admission.

The court of appeals invalidated this program using a version of "strict scrutiny" that no race-based scholarship program today could possibly survive. The court's decision has changed the law as it has been understood, in a way that will affect countless schools and students across the nation. Certiorari is warranted to clarify the applicability of this Court's prior decisions and to clarify the circumstances in which a university may offer race-based scholarships.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S SCHOOL DESEGREGATION DECISIONS AND MISCONSTRUES ITS AFFIRMATIVE ACTION DECISIONS.

The court of appeals reversed the presumption and burden of proof applied in this Court's decisions fashioning remedies when findings of past discrimination

in education have been made. It exacerbated that error by holding that the Banneker Program is not narrowly tailored, even though it is undisputed that the Program has no effect on the admission of any student to the University and no appreciable effect on scholarship funds available to non-black students. The decision below substantially departs from, and conflicts with, this Court's precedents.

The court of appeals' decision was based upon a serious misreading of this Court's affirmative action cases -- in particular, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) -- and a complete disregard of the Court's decisions mandating the adoption of effective remedial measures when unlawful segregation or past discrimination in education has been established. In a series of decisions spanning four decades, this Court has regularly affirmed the implementation of sweeping remedial measures in elementary and secondary schools, in recognition of the extensive harm that arises from the denial of equal educational opportunity. *See, e.g., Green v. County School Bd. of New Kent County,* 391 U.S. 430, 437-38 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).[11] Similarly, this Court has held that race-conscious remedies affecting an entire system of public higher education are constitutionally *required* when state action traceable to prior discrimination continues to foster segregation. *See United States v. Fordice*, 112 S.Ct. 2727 (1992).

---

[11] *See also Freeman v. Pitts,* 112 S.Ct. 1430, 1443 (1992); *Board of Educ. of Oklahoma City v. Dowell,* 111 S.Ct. 630, 638 (1991); *Milliken v. Bradley,* 433 U.S. 267, 280 (1977); *Keyes v. School District No. 1,* 413 U.S. 189, 200 (1973).

These are the decisions that control this case, for this action involves a state university that, as the district court painstakingly illustrated, was "racially segregated by law" for approximately 100 years and "actively resistant" to changing that condition "for at least twenty years thereafter." (App. 34a; *see also* 36a-49a.) The Banneker Program was not adopted in a vacuum. Rather, it is part of a much broader State effort to remedy past discrimination and to avoid severe and drastic federal sanctions threatened by the Department of Education's Office for Civil Rights, which previously found the State's higher education system to be unlawfully segregated. (App. 41a-49a; 110a-111a.) That federal agency has broad powers to order the remedying of the State's past discrimination, *see* 42 U.S.C. § 2000d-1; 34 C.F.R. §§ 100.3(b)(6)(i)-(ii), 100.5(h), and to this day continues to monitor the State's desegregation efforts because, in OCR's view, the State still operates a segregated higher education system. (App. 48 n.42.) *See also* 59 Fed. Reg. 4271 (1994) (notice stating OCR will apply the standards set out in *United States v. Fordice* when reviewing desegregation plans of Maryland and several other states).

This Court has recognized that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15. That flexibility also applies when findings of past discrimination are made by "administrative bodies [that] have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies." *Regents of the University of California v. Bakke*, 438 U.S. 265, 302 n.41 (1978). *See United Jewish Organizations of*

Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165-66 (1977). In both situations, "[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution," *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 16, and to ensure that the vestiges of discrimination are "eliminated root and branch." *Green v. County School Bd. of New Kent County*, 391 U.S. at 438.

The court of appeals disregarded this Court's desegregation cases and the context out of which the Banneker Program arose, relying instead upon *Croson* and *Wygant*. Stating that "the University stands before us burdened with a presumption that its choice cannot be sustained" (App. 6a), the court of appeals held that *the University* "must, at a minimum, *prove* that the effect it proffers is caused by the past discrimination," and that its remedy is "narrowly tailored to meet the remedial goal." (App. 9a) (emphasis added). The court then applied these standards in a way that made the "presumption" of invalidity virtually irrebuttable.

The standards set out in *Croson* and *Wygant*, however, are not applicable in this case for two reasons. First, those cases, unlike this one, involved purely voluntary measures that were adopted in the absence of any findings of discrimination.[12] The presumption of invalidity that those cases apply to race-based classifications is inapplicable in cases such as this, in which there have been "judicial, legislative, or

---

[12] *See Croson*, 488 U.S. at 505 ("none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry"); *Wygant*, 476 U.S. at 278 (no finding of discrimination by school board, which denied past discrimination in teacher hiring).

administrative findings of constitutional or statutory violations . . . ." *Bakke*, 438 U.S. at 307. Once "such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated." *Id*. at 308. Accordingly, in these cases, the "use of a racial classification to remedy th[e] violation [is] presumptively valid," *United States v. Paradise*, 480 U.S. 149, 193 n.2 (1987) (Stevens, J., concurring in judgment), as "the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined." *Bakke*, 438 U.S. at 308.

Therefore, "[t]he burden of proof in a case like this is precisely the opposite of that in cases such as *Wygant* . . . and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which did not involve any proven violations of law." *United States v. Paradise*, 480 U.S. at 193 (Stevens, J., concurring in judgment). *See also United States v. Fordice*, 112 S.Ct. at 2743 (O'Connor, J., concurring) ("I write separately to emphasize that it is Mississippi's burden to prove that it has undone its prior segregation. . . ."). In these cases, "[a] party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness.'" *United States v. Paradise*, 480 U.S. at 193 (Stevens, J., concurring in judgment). The court of appeals was wrong, therefore, in presuming that the Banneker Program is unlawful and in requiring the University to prove that its program was narrowly tailored to remedy the present effects of its past discrimination.

Second, the standards set out in *Croson* and

Wygant are also inappropriate here because those cases, unlike this one, involved race-based measures that imposed substantial burdens or disadvantages on members of the non-minority group. Those individuals lost contracts or employment for which they otherwise would have been eligible. Here, by contrast, respondent has never even attempted to argue that the Banneker Program has a comparable impact on non-black students, because the undisputed factual record shows that no such impact exists. As the district court stated, Banneker scholarships have "no effect" upon a non-Banneker student's ability to attend the University, "the Program consumes only 1% of the total financial aid budget at the University," and no non-Banneker student has suffered "any appreciable monetary loss" as a result of the Banneker Program. (App. 87a.) Thus, the district court concluded that the Banneker Program directly advances the goal of remedying the effects of the University's past exclusion of blacks "without interfering with the rights of others in the process." (*Id.*)

When the rights of innocent third parties are materially affected by a race-conscious remedy, it is appropriate to ask whether the remedy is "narrowly tailored" to prevent unnecessary harm to those individuals. *See, e.g., United States v. Paradise*, 480 U.S. at 182 (opinion of Brennan, J.), 187 (Powell, J., concurring); *Wygant*, 476 U.S. at 283. But when, as here, the rights of third parties are not appreciably affected -- or the impact, if any, is "so widely dispersed" and so "slight" -- there is no substantial question of narrow tailoring. *See Fullilove v. Klutznick*, 448 U.S. at 515 (Powell, J., concurring); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 597 (1990). In such a case, there can be greater flexibility in "balanc[ing] the individual and collective interests at stake . . . ." *United States v.*

Paradise, 480 U.S. at 185.

There are, in sum, fundamental differences between the standards that apply to truly *voluntary* affirmative action programs that confer benefits *at the expense* of innocent third parties, and those that apply to remedial programs that are based on *findings* of past discrimination and that have *no adverse impact* on other individuals. The court of appeals erred in failing to recognize these distinctions and in rigidly adhering to the standards set out in *Croson* and *Wygant*. That error directly determined the outcome of this case.

The court of appeals directed the entry of summary judgment in respondent's favor based upon its conclusion that the Banneker Program is not narrowly tailored. But that conclusion ignored the indisputable fact that the program has no substantial "impact . . . on the rights of third parties." *Paradise*, 480 U.S. at 171. The court of appeals did not even consider the impact that the Banneker Program has on non-black students. Had it done so, the court would have been obligated to find, as the district court did, that the Banneker Program is a narrowly tailored remedy for the University's past discrimination.

Instead of considering the Program's effect on non-blacks, the court of appeals held that the Program was not narrowly tailored largely because, in the court's view, the Program benefited the *wrong* blacks. Non-residents and "high achieving" blacks, the court stated, "are not the group against which the University discriminated in the past." (App. 20a.) This statement, however, ignores the University's undisputed prior exclusion of *all* blacks -- in-state, out-of-state, high-achieving and all others -- from

its campus.[13] It also conflicts with the well-settled principle that race-based relief may benefit "individuals who were not the actual victims of a defendant's discriminatory practices." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986). *See also Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 444-45 (1986); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1; *Green v. County School Bd. of New Kent County*, 391 U.S. 430.

The court of appeals' strong presumption of invalidity also affected the outcome of this case. The court, for example, rejected as a matter of law the University's proof that blacks were underrepresented in the student body because its statistical analysis had failed to "factor out . . . all nontrivial, non-race-based" explanations for the disparities that were identified. (App. 24a.) There are two significant flaws, however, in the court's reasoning.

First, it assumes incorrectly that the University has the burden to disprove all such non-discriminatory explanations.[14] As explained above, given the undisputed

---

[13] This statement also ignores (1) that it was necessary for the University to recruit out-of-state blacks because of its poor reputation among Maryland blacks (J.A. 2907), and (2) that, as the district court found, attracting high-achieving black students to the University helps improve its reputation, increases the number of black students applying to UMCP, enhances the retention and graduation rates of blacks on campus, and helps reduce racial tensions. (App. 83a.)

[14] The court's rationale also conflicts with this Court's recognition that the effects of discrimination can give rise to remedial relief even though factors unrelated to that

(continued...)

evidence of past discrimination and OCR's findings, the burden should have been placed on the plaintiff to show that the remedy was unreasonable.

Second, even assuming that the University had the same burden of proof that would apply in the absence of such findings, that burden would be satisfied by *preliminary* proof demonstrating a *prima facie* case, *see Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 274-75, or by facts giving rise to "an *inference*" of continuing effects. *Croson*, 488 U.S. at 503, 509 (emphasis added); *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring).[15] When, as in this case, there are unchallenged findings of past discrimination, the University easily met any burden it had of showing continuing underrepresentation by demonstrating (a) that the percentage of incoming freshmen who were African-American was less than either the percentage of students taking the SAT in Maryland, the percentage with the minimum course curriculum required, or the percentage with the minimium math and verbal SAT scores; and (b) that African-American students leave the University in significantly

---

[14](...continued)
discrimination may also influence a student's college choice and a college's racial identifiability. *See United States v. Fordice*, 112 S.Ct. at 2736.

[15] These standards of preliminary proof were applied in *Croson* and *Wygant* in deciding whether there had been any discrimination at all. Surely no heavier burden attaches to the question whether the conceded discrimination, once found to have existed, has continuing effects. The University's burden, if any, on that question should be lighter, both because proven discrimination changes the equities and because tracing lasting effects is more difficult than making an initial determination of discrimination.

greater numbers than students from any other racial group. (App. 63a-75a.) To require the University to disprove all "non-race-based" explanations for these disparities is to impose a greater burden than would have been warranted even in the absence of a finding of past discrimination.

The court of appeals' strong presumption of invalidity also affected its analysis of the other present effects relied upon by the University and the district court. Without questioning the undisputed fact that there is a racially hostile climate on the UMCP campus -- or the evidence that the University's history of past segregation could contribute to such a climate -- the court of appeals held, as a matter of law, that racial "tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland" because they are the product of "societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy." (App. 13a.) The court ignored the evidentiary record that the district court cited in finding that "the University's adverse racial climate is a legacy of its past discriminatory practices." (App. 79a.)

Finally, the court of appeals did not even question the district court's finding that past discrimination had contributed to the University's poor reputation among blacks -- another of the present effects relied upon by the University and the district court. That, the court of appeals held, "is not the kind of present effect that can justify a race-exclusive remedy." (App. 10a.) This Court has recognized, however, that a "reputation for discrimination may discourage minorities from seeking available employment." *Sheet Metal Workers v.*

E.E.O.C., 478 U.S. at 449. *See also* Part II, *infra*.[16] The court of appeals' presumption of invalidity was so strong that this effect was given no weight at all.

It is difficult to imagine how any affirmative action program could pass the test that the court of appeals constructed. Its decision has thrown both the law and countless remedial race-based scholarship programs into a state of confusion.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND WITH THE RECENT POLICY GUIDANCE OF THE UNITED STATES DEPARTMENT OF EDUCATION.

Review is also warranted because the court of appeals' decision conflicts with decisions of other courts of appeals and with the policy of the federal government.

The court of appeals held that the district court's findings of a poor reputation in the black community and a hostile campus climate for blacks are insufficient, as a

---

[16] One need not resort "to history books", as the court of appeals suggested, to be affected by the University's past discrimination. (App. 10a.) The longstanding historical violation that preceded the Banneker Program only ended recently and continues to manifest itself in many ways, affecting, for example, parents and high school counselors who were excluded from the University and now influence students' college choices. (App. 54a-60a.) As the district court candidly stated, "history contributes mightily to our prejudices, and it is at best naive and at worst disingenuous to suggest that a culture of bigotry inculcated over centuries can be erased by less than twenty years of ameliorative measures." (App. 91a.)

matter of law, to justify the Banneker Program. (App. 9a-13a.) The Eleventh Circuit has expressly recognized, however, that "a university that maintains a climate traceable to segregation with continuing segregative effects must remedy the climate to the extent that such can be done in a practicable and educationally sound manner." *Knight v. Alabama*, 14 F.3d 1534, 1553 (11th Cir. 1994). Courts of appeals in the Fifth and Eighth Circuits have also reached decisions contrary to the decision below. *See Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974) ("[W]e are not sanguine enough to be of the view that benign recruitment programs can purge in two years a reputation which discriminatory practices of approximately 30 years have entrenched in the minds of blacks in Mississippi."); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) ("Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis.").

In addition, the court of appeals' first decision in this case conflicts with other federal circuit court decisions.[17] In *Podberesky I*, the court of appeals held that OCR's findings that the State maintained a racially-segregated higher education system in violation of federal law did not provide a constitutionally sufficient justification for the Banneker Program, even though OCR

---

[17] Although the University did not seek immediate review of the court of appeals' decision in *Podberesky I*, it may now. *See Sheet Metal Workers v. E.E.O.C.*, 478 U.S. at 444 n.24.

had continued to monitor the State's efforts to eliminate the vestiges of past discrimination at the time respondent was admitted to the University. (App. 103a-106a.) By contrast, the Eighth, Eleventh, and Sixth Circuits have upheld the validity of race-based remedial action implemented under circumstances virtually identical to those under which the Banneker Program arose. *See Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (holding that OCR's findings of past discrimination justified race-conscious remedies implemented to eliminate the discriminatory effects of Arkansas's racially-segregated higher education system); *Palmer v. District Board of Trustees of St. Petersburg Junior College*, 748 F.2d 595 (11th Cir. 1984) (same with respect to Florida's higher education system); *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986) (blacks-only graduate admission program justified by findings of discrimination and continuing federal oversight).

The court of appeals' judgment in this case also conflicts with the February 17, 1994 Policy Guidance of the U.S. Department of Education, which embraces the approach that the district court adopted and encourages colleges and universities to award race-targeted scholarships in several enumerated circumstances, including (a) when a State seeks to remedy its own past discriminatory conduct or discrimination at higher education institutions in that State, and (b) when a college or university seeks to attain a diverse student body. *See* 59 Fed. Reg. 8759-62. Respondent acknowledged this conflict below, but argued that the conflict is insignificant because "the DOE policy is inconsistent with existing case law. . . ." November 23, 1994 Response to Petition for Rehearing at 8. On the contrary, the court of appeals' decision conflicts with existing case law and invalidates a scholarship program that another branch of the federal

government would specifically allow at UMCP and at other colleges and universities throughout the nation.

Review is warranted to resolve these conflicts between the court of appeals' decisions and the law of other circuits and the policy of the United States government.

III. THE COURT OF APPEALS MISCONSTRUED THIS COURT'S DECISION IN *BAKKE* TO PROHIBIT THE USE OF RACE-BASED SCHOLARSHIPS TO ATTAIN A DIVERSE STUDENT BODY.

This case also presents the important question whether, even in the absence of unlawful discrimination, race-based scholarships may be employed to achieve a diverse student body. This Court has recognized that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated. . . ." *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. at 568 (*quoting Bakke*, 438 U.S. at 311-13). The interest in racial diversity is "sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). The University relied upon its compelling interest in diversity as an additional basis for the Banneker Program. (App. 213a.)

The holding of *Bakke*, as determined by Justice Powell's opinion, was that race may be used as a factor, but not as a prerequisite, in college or university *admissions* decisions. *Bakke* does not address, however,

whether race may be used as a prerequisite in *scholarship* programs to further the goal of diversity. Race-based scholarship programs such as the Banneker Program are different from race-based admissions programs in two critical respects.

First, the respective impacts that admissions and scholarship programs have on non-minorities are substantially different. As the district court found, the Banneker Program awards scholarships only after admission decisions are made and thus has "no effect" on a non-black student's ability to attend the University. (App. 87a.)

Second, the evidence shows that there is no less restrictive, yet equally effective, alternative to race-exclusive scholarships as a means of advancing the compelling interest in diversity. In *Bakke*, Justice Powell, after analyzing the experience of Harvard and other universities that had used race as a *factor* in admissions, concluded that using race as a *requirement* was unnecessary to accomplish diversity. *See* 438 U.S. at 317-19. In this case, by contrast, the uncontroverted evidence from college and university presidents and administrators shows that using race as a mere factor in a scholarship program will not be as effective in promoting student diversity. (J.A. 3023; 3028; 3060.)

The United States Department of Education has acknowledged that judgment. Noting that there are "important differences between admissions and financial aid," 59 Fed. Reg. 8762, the Department has expressed its agreement with the "many colleges [that] submitted comments arguing that the use of race or national origin as a plus factor in awarding financial aid may be

inadequate to achieve diversity." *Id.* at 8761.[18] Those expert judgments are entitled to considerable weight, particularly absent any adverse impact of the Banneker Program on non-black students. *Cf. Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225-26 & n.12 (1985); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957).

The court of appeals implicitly rejected these distinctions between race-based admissions and scholarship programs. In its first opinion, the court cited *Bakke* and noted that "[i]n this case, the scholarship funds are set aside for black students only . . . ." (App. 103a-104a n.4.) The court added that "ethnic diversity does not appear to be the real interest behind the program." (*Id.*) Following remand, however, the University explicitly found in further administrative proceedings that the Banneker Program advanced two important interests: remedying past discrimination and achieving diversity. (App. 139a; 157a; 164a; 213a.) Both rationales were asserted in the courts below. The district court found it unnecessary to address the diversity argument, however, and the court of appeals implicitly rejected it by ignoring the University's request for a remand to permit the district court to address the issue. That issue has been clearly raised and preserved, and review is warranted to resolve finally whether a race-based scholarship program is a constitutionally legitimate means of advancing the

---

[18] *See also* "Minority Designated Scholarship Programs, A Compilation of Available Data on the Scope and Extent of Programs," American Council on Education, 1991 (63% of higher education institutions surveyed consider minority-based financial aid programs to be very important in attracting and retaining minority students).

goal of educational diversity.[19]

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit. Following review, the judgment should be reversed.

Respectfully submitted,

KEVIN T. BAINE
STEVEN M. FARINA
Williams & Connolly
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
RICHARD A. WEITZNER
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6330

*Counsel of Record

Attorneys for Petitioners

---

[19] At the very least, this Court should remand this case with instructions that the diversity argument be addressed.

Supreme Court, U.S.
FILED

94 1620 MAR 29 1995

OFFICE OF THE CLERK

Nos. 94-___, ___

In the

Supreme Court of the United States

October Term, 1994

WILLIAM E. KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX

KEVIN T. BAINE
STEVEN M. FARINA
Williams & Connolly
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
RICHARD A. WEITZNER
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6330

**Counsel of Record*

Attorneys for Petitioners Kirwan and University of Maryland College Park

[Additional counsel listed on inside cover]

WILLIAM J. MURPHY
JOHN J. CONNOLLY
Murphy & Shaffer
100 Light Street, Suite 750
Baltimore, MD 21202
(410) 752-1564

SALLY P. PAXTON
JACQUELINE R. DEPEW
Fulbright & Jaworski, L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200

ELAINE R. JONES
Director-Counsel

THEODORE M. SHAW
NORMAN J. CHACHKIN
NAACP Legal Defense
& Educational Fund,
Inc.
99 Hudson Street, 16th fl.
New York, NY 10013
(212) 219-1900

JANELL M. BYRD*
NAACP Legal Defense
& Educational Fund,
Inc.
1275 K Street, N.W.,
Suite 301
Washington, D.C. 20005
(202) 682-1300

*Counsel of Record

Attorneys for Petitioners Greene, et al.

TABLE OF CONTENTS

Page

Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) 1a

Podberesky v. Kirwan, 46 F.3d 5 (4th Cir. 1994) 30a

Podberesky v. Kirwan, 838 F.Supp. 1075 (D. Md. 1993) 34a

Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992) 96a

Podberesky v. Kirwan, 764 F.Supp. 364 (D. Md. 1991) 109a

April 26, 1993 Decision and Report of The University of Maryland at College Park Regarding The Benjamin Banneker Scholarship Program 139a

U.S. Constitution, Amendment XIV, § 1 . . . . . 221a

42 U.S.C. § 1981 . . . . . 221a

42 U.S.C. § 2000d 221a

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DANIEL J. PODBERESKY,
Plaintiff-Appellant,

v.

WILLIAM E. KIRWAN, President of the University of Maryland at College Park; UNIVERSITY OF MARYLAND AT COLLEGE PARK (UMCP); MONICA GREEN; MAUDLYN GEORGE, on her own behalf and on behalf of her daughter Allison George; EILEEN HEATH; RICHARD A. DALGETTY; GERARD W. HENRY; MAISHA HERREN; ALETHA S. MCRAE, on her own behalf and on behalf of her daughter Daletha McRae; CHARLES L. SMITH, III, on his own behalf and on behalf of his son Charles Smith, IV,
Defendants-Appellees.

No. 93-2527

EQUAL OPPORTUNITY FOUNDATION; AMERICAN COUNCIL ON EDUCATION; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; WILLIAM JULIUS WILSON, Doctor; ASSOCIATION FOR THE STUDY OF AFRO-AMERICAN LIFE AND HISTORY; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; UNITED STATES OF AMERICA,
Amici Curiae.

DANIEL J. PODBERESKY,
Plaintiff-Appellant,

v.

WILLIAM E. KIRWAN, President of the University of Maryland at College Park; UNIVERSITY OF MARYLAND AT COLLEGE PARK (UMCP); MONICA GREEN; MAUDLYN GEORGE, on her own behalf and on behalf of her daughter Allison George; EILEEN HEATH; RICHARD A. DALGETTY; GERARD W. HENRY; MAISHA HERREN; ALETHA S. MCRAE, on her own behalf and on behalf of her daughter Daletha McRae; CHARLES L. SMITH, III on his own behalf and on behalf of his son Charles Smith, IV,
Defendants-Appellees.

No. 93-2585

EQUAL OPPORTUNITY FOUNDATION; AMERICAN COUNCIL ON EDUCATION; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; WILLIAM JULIUS WILSON, Doctor; ASSOCIATION FOR THE STUDY OF AFRO-AMERICAN LIFE AND HISTORY; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; UNITED STATES OF AMERICA,
Amici Curiae.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CA-90-1685-JFM)

Argued: May 10, 1994

Decided: October 27, 1994

Before WIDENER, WILKINS, and HAMILTON, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Widener wrote the opinion, in which Judge Wilkins and Judge Hamilton joined.

COUNSEL

ARGUED: Richard Abbott Samp, WASHINGTON LEGAL FOUNDATION, Washington, D.C., for Appellant. Evelyn Omega Cannon, Assistant Attorney General, Baltimore, Maryland; Janell Maria Byrd, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., Washington D.C., for Appellees. **ON BRIEF:** Daniel J. Popeo, WASHINGTON LEGAL FOUNDATION, Washington, D.C.; Samuel Podberesky, Randallstown, Maryland, for Appellant. J. Joseph Curran, Jr., Attorney General of Maryland, Andrew H. Baida, Assistant Attorney General, Richard A. Weitzner, Assistant Attorney General, Baltimore, Maryland; Elaine R. Jones, Director-Counsel, Theodore M. Shaw, Norman J. Chachkin, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., New York, New York; William J. Murphy, John J. Connolly, MURPHY & SCHAFFER, Baltimore, Maryland; Sally P. Paxton, Jacqueline R. Depew, FULBRIGHT & JAWORSKI, L.L.P., Washington, D.C., for Appellees. Hugh Joseph Beard, Jr., Washington, D.C.; John Montgomery, Germantown, Maryland, for Amicus Curiae Equal Opportunity Foundation. David S. Tatel, Martin Michaelson, Daniel B. Kohrman, HOGAN & HARTSON, L.L.P., Washington, D.C.; Sheldon E. Steinbach, General Counsel, AMERICAN COUNCIL ON EDUCATION, Washington, D.C., for Amicus Curiae American Council on Education. Elizabeth Guillen, Antonia Hernandez, Theresa Fay-Bustillos, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, Los Angeles, California, for Amicus Curiae MALDEF. James E.

Coleman, Jr., John H. Cobb, WILMER, CUTLER & PICKERING, Washington, D.C., for Amicus Curiae Wilson. A. J. Cooper, GINSBURG, FELDMAN & BRESS, Washington, D.C.; Amy B. Ginensky, Vernon L. Francis, Andrew S. Miller, DECHERT, PRICE & RHOADS, Philadelphia, Pennsylvania, for Amicus Curiae Association for the Study of Afro-American Life and History. Thomas J. Henderson, Wendy Parker, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C.; George W. Jones, Jr., Mark E. Haddad, Jeanne B. Szromba, SIDLEY & AUSTIN, Washington, D.C., for Amicus Curiae Lawyers' Committee. James P. Turner, Acting Assistant Attorney General, David K. Flynn, Leslie A. Simon, Marie K. McElderry, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States.

OPINION

WIDENER, Circuit Judge:

The issue in this case is whether the University of Maryland at College Park may maintain a separate merit scholarship program that it voluntarily established for which only African-American students are eligible. Because we find that the district court erred in finding that the University had sufficient evidence of present effects of past discrimination to justify the program and in finding that the program is narrowly tailored to serve its stated objectives, we reverse the district court's grant of summary judgment to the University. We further reverse the district court's denial of Podberesky's motion for summary judgment, and we remand for entry of judgment in favor of Podberesky.

I

The facts and prior proceedings in this case are set

forth at length in our earlier opinion, *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992) (*Podberesky I*). In sum, Daniel Podberesky challenges the University of Maryland's Banneker scholarship program, which is a merit-based program for which only African-American students are eligible. The University maintains a separate merit-based scholarship program, the Francis Scott Key program, which is not restricted to African-American students. Podberesky is Hispanic; he was therefore ineligible for consideration under the Banneker Program, although he met the academic and all other requirements for consideration. Podberesky was ineligible for consideration under the Key program because his academic credentials fell just shy of its more rigorous standards.

In our earlier decision, we remanded the case because the district court had not made a specific finding on whether there was sufficient present effect of the University's past discrimination against African-Americans so as to justify the maintenance of the race-based restriction in the Banneker scholarship program. *Podberesky I*, 956 F.2d at 57. The district court allowed additional discovery to take place, after which cross-motions for summary judgment were filed. *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1076-77 (D. Md. 1993). The University claimed that four present effects of past discrimination exist at the University: (1) The University has a poor reputation within the African-American community; (2) African-Americans are under-represented in the student population; (3) African-Americans students who enroll at the University have low retention and graduation rates; and (4) the atmosphere on campus is perceived as being hostile to African-American students. 838 F. Supp. at 1082. The district court reasoned that if a strong evidentiary basis existed to support any of the four present effects articulated by the University, the Banneker Program would be justified. The district court

then found that there was a strong evidentiary basis to support the existence of each of those four present effects. 838 F. Supp. at 1083.

The district court also found that the Banneker Program was narrowly tailored to remedy those four present effects of past discrimination which it found at the University. 838 F. Supp. at 1094. The district court then granted the University's summary judgment motion and denied Podberesky's summary judgment motion. This appeal followed.

II

Because it chose the Banneker Program, which excludes all races from consideration but one, as a remedial measure for its past discrimination against African-Americans, the University stands before us burdened with a presumption that its choice cannot be sustained. As we have said before,

> "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (Plurality opinion) (*quoting Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J.)). The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the causual invocation of benign remedial aims. *City of Richmond v.*

> *J.A. Croson Co.*, 488 U.S. 469, 500 (1989). While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.... It thus remains our constitutional premise that race is an impermissible arbiter of human fortunes.

Maryland Troopers Ass'n v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993) (parallel citations omitted).

Although the district court correctly recited in its opinion that the standard of review of such an overtly open racial yardstick was strict scrutiny, and despite the fact that that standard has been adopted time and again both by the Supreme Court and by this circuit, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, (1989); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 212, (4th Cir. 1993), its restlessness in compliance with that standard showed through as it rejected explicitly cases from four other Courts of Appeals and a reference pool of those high school graduates who were in fact eligible for admission to the University: "There is a danger (created in part by the images of microscope and magnifying glass which the term 'strict scrutiny' brings to mind) that a judge will become myopic when confronted with statistics such as these and assume that a single reference pool much be selected. In fact, such a narrowing of perspective is neither necessary nor proper." 838 F. Supp. at 1089. When we add (as we demonstrate below) that both the Supreme court and this court have used a pool of qualified applicants as a reference pool in other than employment context, it is not out of order to note that this restlessness carried through its opinion. Indeed, in the

penultimate section thereof, the court justified this analysis by its statement that "I have reached the conclusion that in our earlier opinions both I and the Fourth Circuit may have construed too rigid a framework of analysis," and this "[b]ecause I have come to believe that (1) precedents involving employment disputes provide imperfect analogies for determining the constitutionality of an affirmative action program in an education context, and (2) focusing solely upon past discrimination in education cases blurs vision and obstructs understanding...." 838 F. Supp. at 1097. Altogether, these insights into the way the district court arrived at its conclusion amount to little more than tacit acknowledgement by that court that the Banneker Program would not withstand strict scrutiny analysis, which it does not.

We have established a two-step analysis for determining whether a particular race-conscious remedial measure can be sustained under the Constitution: (1) the proponent of the measure must demonstrate a "'strong basis in evidence for its conclusion that remedial action [is] necessary;'" and (2) the remedial measure must be narrowly tailored to meet the remedial goal.[1] *Maryland Troopers*, 993 F.2d at 1076 (citing and quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)). The purpose of our earlier remand in this case was to allow the district court to determine whether the University could prove that there were present effects of past discrimination which warranted such race conscious remedial action.

---

[1]The district court sets forth an alternate analysis that it thinks should be used instead of an analysis grounded in *Croson* and *Wygant*. 838 F. Supp. at 1097-99. We reject the district court's contention that its proposed analysis is the correct one.

Podberesky I, 956 F.2d at 56.

At the outset, we note that the district court held that any present effect of past discrimination *found by the University* would be sufficient under our *Maryland Troopers* decision and the Supreme Court's opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), to justify the program: "UMCP's finding that the consequences of its segregative past continues to be felt *ipso facto* established the necessity for relief." 838 F. Supp. at 1094. However, *Croson* itself makes clear that the district court's assumption is incorrect. To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program. As to the effect justifying the remedial measure, "'[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" *Maryland Troopers*, 993 F.2d at 1076 (4th Cir. 1993) (quoting *Croson*, 488 U.S. at 493 (plurality opinion)). Therefore, the district court was incorrect in stating that if the University found strong evidence to support any of its proffered effects, the program would be justified. The effects must themselves be examined to see whether they were caused by the past discrimination and whether they are of a type that justifies the program. Only then could we consider affirming the district court's grant of summary judgment to the University on this issue.

A

Turning to the present effects articulated by the

University, we disagree with the district court that the first effect, a poor reputation in the African-American community, and the fourth effect, a climate on campus that is perceived as being racially hostile, are sufficient, standing alone, to justify the single-race Banneker Program. As the district court's opinion makes clear, any poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students. There is no doubt that many Maryland residents, as well as some citizens in other States, know of the University's past segregation, and that fact cannot be denied. However, mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as there are people who have access to history books, there will be programs such as this one. Our decisions do not permit such a result. *See, e.g., Maryland Troopers*, 993 F.2d at 1079.

The hostile-climate effect proffered by the University suffers from another flaw, however. The main support for the University's assertion that the campus climate is hostile to African-American students is contained in a survey of student attitudes and reported results of student focus groups.[2] For an articulated effect to justify the program, however, there must be a connection between the past discrimination and the effect.

---

[2]The hostile climate is claimed to manifest itself in the student newspaper, the fraternity and sorority system, and in the fact that students tend to segregate themselves in classrooms, social situations, and the dining halls. In addition, there have been claimed instances of racist and patronizing comments by faculty member. Some instances of white and black backlash have occurred when the University has either implemented or trimmed minority-student programs. See 838 F. Supp. at 1092-93.

United States v. Fordice, 60 U.S.L.W. 4769, 4772 n.4 (U.S. 1992). The district court recognized this and reasoned that there was a nexus because racial incidents have occurred with some frequency and regularity, which the district court called a "stream," 838 F. Supp. at 1092, since 1970, which is when the district court found that *de facto* segregation ended at the University. The district court found that "[t]he very nature of the college experience is that younger students learn from older ones.... Since 1970, both black and while students have been handing down racial attitudes that perpetuate a hostile racial climate." 838 F. Supp. at 1093. The district court appears to have found the connection between the University's previous discriminatory acts and the present attitudes obvious, but we have not so found it. The frequency and regularity of the incidents, as well as claimed instances of backlash to remedial measures, do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination, which the district court implicitly held.

Podberesky argues that the claimed hostility did not have its genesis in the University's discriminatory acts of the past. He points to several northern universities that suffer from comparable racial problems.[3] The district

---

[3]This table includes both northern and southern schools, as is apparent.

Black Enrollment Trends (1984-1990)
at Major State Universities in
States with Sizeable Black Populations*

	Undergraduate Enrollment - % Black			
Institution	1984	1986	1988	1990
UMCP	8.1%	8.9%	9.7%	10.7%

court rejected this argument for the reason that it found that most northern universities had experienced *de facto* segregation, and it held that racial hostility on the northern universities' campuses was the present effect of those universities' past *de facto*, not *de jure*, discrimination. 838 F. Supp. at 1090-91.

The district court's analysis cannot be sustained on this point. When we begin by assuming that every predominately white college or university discriminated in

---

Univ. of Alabama	9.7%	---	9.5%	9.6%
Auburn	3.0%	3.6%	3.7%	4.3%
Univ. of Arkansas	5.5%	5.2%	4.9%	6.7%
Univ. of Delaware	3.3%	3.9%	4.4%	4.6%
Univ. of Florida	6.0%	6.3%	6.4%	6.5%
Univ. of Georgia	5.7%	5.3%	5.1%	5.8%
Univ. of Illinois (Urbana)	3.9%	4.5%	5.7%	6.9%
Louisiana State University	7.0%	7.6%	7.7%	8.1%
Univ. of Mich. (Ann Arbor)	4.7%	5.2%	5.8%	6.4%
Univ. of Mississippi	6.2%	5.7%	---	7.5%
Univ. of Missouri (Col.)	3.8%	3.5%	3.7%	4.0%
Rutgers (New Brunswick, NJ)	8.1%	8.1%	8.7%	8.8%
SUNY (Binghamton)	3.7%	4.5%	5.2%	5.0%
Univ. of N.C. (Chapel Hill)	9.7%	8.6%	8.8%	9.6%
Ohio State (Main Campus)	4.7%	4.6%	4.5%	5.4%
Clemson (S.C.)	4.7%	4.6%	4.5%	7.0%
Univ. of S.C. (Columbia)	15.4%	13.9%	13.5%	13.9%
Univ. of Tenn. (Knoxville)	4.6%	4.4%	4.5%	5.1%
Univ. of Texas (Austin)	3.7%	3.7%	3.9%	3.8%
Virginia Polytechnic Inst.	4.7%	3.7%	3.7%	4.6%
Univ. of Va. (Main Campus)	8.5%	7.6%	9.1%	10.0%

Source: DOEd Data

* States included are those with Black populations equal to at least 10% of the overall population, based on 1990 census data. Universities selected are the largest and/or most prestigious state research institutions like UMCP. For several states more than one institution is listed.

the past, whether or not true, we are no longer talking about the kind of discrimination for which a race-conscious remedy may be prescribed. Instead, we are confronting societal discrimination, which cannot be used as a basis for supporting a race-conscious remedy. *Podberesky I*, 956 F.2d at 55 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion.)). There is no doubt that racial tensions still exist in American society, including the campuses of our institutions of higher learning. However, these tensions and attitudes are not a sufficient ground for employing a race-conscious remedy at the University of Maryland. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (majority opinion).

B

We next turn to the two effects that rely on statistical data: underrepresentation of African-American students at the University and low retention and graduation rates for African-American students. The district court found that there was strong evidence of African-American underrepresentation in the University's entering-student classes. With respect to the low retention and graduation rates, the district court found that the statistics showed that African-American students had higher attrition rates than any other identifiable group on campus.

The district court erred in its analysis of the underrepresentation evidence and the attrition evidence for a fundamental reason: the posture of the case before the district court was that cross-motions for summary judgment had been filed. We review grants of summary judgment de novo. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988).

Rule 56 provides, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We have held that the rule's language is clear that it is not enough for the district court to determine that the moving party has the winning legal argument; in accepting that argument, the district court must also ensure that there is no genuine issue as to any material fact before a grant of summary judgment is proper. See, e.g., *Charbonnages de France v. Smith*, 597 F.2d 406 (4th Cir. 1979) (reversing grant of summary judgment because of genuine issues of material fact); *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950) ("The motion for summary judgment... should be granted only where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law."); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]he fact that both parties simultaneously are arguing that there is no genuine issue of fact does not establish that a trial is unnecessary thereby empowering the court to enter judgment as it sees fit." 10A Charles A. Wright et al., *Federal Practice and Procedure* § 2720 (2d ed. 1983).

Taking the facts in the light most favorable to Podberesky, the non-moving party, we find that the district court erred in granting the University's motion for summary judgment. As to the low retention and graduation rates, there is a dispute in the evidence about why African-American students leave the University of Maryland in greater numbers than other students. Podberesky offered evidence tending to show that the attrition rate revealed by the statistics was the result of economic and other factors and not because of past

discrimination. The district court rejected Podberesky's study by reasoning that economic concerns are often more pressing for African-American students because many of those students come from less wealthy backgrounds. The district court then reasoned that the disproportionate number of less wealthy African-American families is the result of past discrimination in society. The district court also found some evidence in some of the University's exhibits that showed that the University's poor reputation and hostile climate have an effect on attrition rates. 838 F. Supp. at 1091-92.

As to the underrepresentation, our decisions and those of the Supreme Court have made clear that the selection of the correct reference pool is critical. The district court must first determine as a matter of law whether it is appropriate to apply a pool consisting of the local population or whether another pool made up of people with special qualifications is appropriate. In the employment context, this determination is made by looking at the job requirements. If the job is an unskilled one, the general population is more likely the relevant pool. If, however, the job requires some special skills or training, the relevant pool is made up of only those people who meet the criteria. E.g., *Johnson v. Transportation Agency*, 480 U.S. 616, 631-32 (1987); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072, 1076-77 (4th Cir. 1993). The method of determining the relevant pool by looking at the qualifications needed to take advantage of the opportunity from which minorities historically have been excluded and the prevalence of those qualifications in the population is not limited to the employment context. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989) (majority opinion) (applying analysis to Richmond's minority set-aside program).

The district court rejected a pool which consisted of all graduating high school seniors because that pool "does not take into account even flexible minimum admission requirements." 838 F. Supp. at 1089. Thus, the district court correctly determined the legal issue of whether the appropriate pool was the general population or a smaller qualification specific pool. The district court erred, however, in its attempt to resolve the factual dispute[4] about what are the effective minimum admission criteria.[5] The district court declined to decide the requisite qualification for membership in the reference pool, but mentioned the percentage of students taking the SAT in Maryland, the minimum course curriculum

---

[4]The district court also should have determined as a matter of fact that part of the population which possessed the qualifications. In this case, however the number of students meeting the criteria advocated by Podberesky was not determined because the University did not submit sufficient data to allow the corresponding percentage to be determined. The fact that the numbers are not in the record is not a sufficient basis, however, for rejecting the pool. The pool must be determined based on the qualifications, not by determining which numbers exist in the record and then adopting the corresponding qualifications, which is one way of characterizing what occurred in the district court. The district court could have denied the University's motion for summary judgment and given it more time to come up with the relevant figures.

The above note and associated text assumes the statistical validity of any pool. See Part II.C., *infra*.

[5]The University has no formal requirements for admission with respect to SAT scores and grade-point averages (GPA). Thus, for the years in questions, the district court should have determined what the effective minimum criteria for admission were be determining the lowest GPA and SAT scores achieved by admittees to the University that year.

required, and minimum math and verbal SAT scores. It later found that the percentage of African-American incoming freshman at UMCP (13%) was less than any of them (17.9% for required course curriculum to 22% of students taking the SAT in Maryland who were African-American).[6] 838 F. Supp. at 1088-1089. It rejected Podberesky's proposed effective minimum criterion for admission, which was based on a combination of SAT scores, high school curriculum requirements, and grade-point averages, because the use of those numbers "ignores the variables in the admissions process and the intergenerational effects of segregated education on the applicant pool." 838 F. Supp. at 1089.[7] We are of opinion that the goal of the program, remedying any present effects of past discrimination, cannot be used to lower the effective minimum criteria needed to determine the applicant pool.[8] Additionally, the district court erred

---

[6]The district court also rejected several pools advocated by the University, including a pool of all African-American students graduating from Maryland high schools. 838 F. Supp. at 1089.

[7]Like the University, Podberesky presented several possible pools to the district court. As to the qualifications needed to be eligible for admission, Podberesky argued in part that the appropriate reference pool consisted of those African-Americans who completed the required high school curriculum, maintained a grade-point average of 2.0 or above, attained a verbal SAT score of 270 or better, and attained a math SAT score of 380 or better. Podberesky contends that the University's admissions data reveal that these were the effective minimum criteria for admission. 838 F. Supp. at 1087.

[8]In addition, any intergenerational effects of segregated education are the product of societal discrimination, which cannot support a program such as this one. *Maryland Troopers*, 993 F.2d at 1076 (citing *Wygant*, 476 U.S. at 274-

in resolving, on a summary judgment motion, the factual dispute about the effective minimum criteria for admission.

The factual disputes in this case are not inconsequential and could have been resolved only at trial. A district court may not resolve conflicts in the evidence on summary judgment motions, and the district court erred in so doing here.

III

We next turn to the denial of Podberesky's motion for summary judgment. An order denying summary judgment is ordinarily not appealable. See, e.g., *President & Directors of Georgetown College v. Madden*, 660 F.2d 91, 96-97 (4th Cir. 1981) (per curiam); *Valdosta Livestock Co. v. Williams*, 316 F.2d 188 (4th Cir. 1963) (per curiam). In the circumstances of this case, however, we may review the district court's denial of Podberesky's motion for summary judgment as well as its grant of summary judgment to the University. The district court's orders on the summary judgment motions disposed of all claims between the parties, and the orders are therefore within our appellate jurisdiction under 28 U.S.C. § 1291. See 10 Wright, *supra* § 2715, at 626.

Even if we assumed that the University had demonstrated that African-Americans were underrepresented at the University and that the higher attrition rate was related to past discrimination,[9] we

---

76 (plurality opinion)).

[9]We do not discuss here the hostile environment and poor reputation effects because they are not sufficient to justify the program. See Part II.A, *supra*.

could not uphold the Banneker Program. It is not narrowly tailored to remedy the underrepresentation and attrition problems, and the district court erred in its analysis of this issue as well.

It is difficult to determine whether the Banneker scholarship program is narrowly tailored to remedy the present effects of past discrimination when the proof of present effects is so weak. See *Croson*, 488 U.S. at 507 (majority opinion). In determining whether the Banneker Program is narrowly tailored to accomplish its stated objective, we may consider possible race-neutral alternatives and whether the program actually furthers a different objective from the one it is claimed to remedy.[10] See *Croson*, 488 U.S. at 507 (majority opinion).

A. *Attraction to Only High-Achieving Black Students*

The district court found that the Banneker Program attracted "high-achieving black students" to the

---

[10]Because the Banneker requirement of African descent does not establish the same kind of racial quota as a 50% promotion requirement, the test articulated in Justice Brennan's plurality opinion and Justice Powell's concurring opinion in *United States v. Paradise*, 480 U.S. 149, 171 & 187 (1987), and adopted by this circuit in *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 216 (4th Cir. 1993), may need some slight adjustment when applied in the context of a race-exclusive minority scholarships case. Although *Croson*, too, involved an outright racial quota--a 30% minority business enterprise set-aside--it also involved a claim of present effects of past discrimination. Therefore, we will consider the factors that the Court used in *Croson*. We note, however, that even if we were to apply the five-factor *Hayes* test, the program would not withstand scrutiny under those factors, either.

University, which "directly increases the number of African-Americans who are admitted and likely to stay through graduation. Even more importantly, the Program helps to build a base of strong, supportive alumni, combat racial stereotypes and provide mentors and role models for other African-American students. Continuation of the Program thus serves to enhance [the University's] reputation in the African-American community, increase the number of African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on campus." 838 F. Supp. at 1094-95. In sum, the district court found that the Banneker Program is employed by the University as an effective recruiting tool that draws high-achieving African-Americans to the University. The district court further noted that the University's "success in curing the vestiges of its past discrimination depends upon it attracting high-achieving African-Americans to the College Park campus." 838 F. Supp. at 1095. As we demonstrate below, in conducting its analysis, the district court did not sufficiently connect the problems the University purports to remedy to the Banneker Program: low retention and graduation rates and underrepresentation. If the purpose of the program was to draw only high-achieving African-American students to the University, it could not be sustained. High achievers, whether African-American or not, are not the group against which the University discriminated in the past.

B. *Including Non-Residents of Maryland*

The district court also erred in giving no weight to Podberesky's argument that the Banneker Program is not narrowly tailored because the scholarships are open to

non-Maryland residents.[11] The district court stated that the goals of the program would be served "whether Banneker Scholars are Maryland natives or not." 838 F. Supp. at 1095 n.74. It is at once apparent that the Banneker Program considers all African-American students for merit scholarships at the expense of non-African-American Maryland students.

The University, throughout this case, has taken the position that the pool from which the students eligible to enter UMCP is drawn are from "qualified African-American high school students in Maryland," A. 3476, and "the University expects that the racial composition of its student body will reflect the racial composition of qualified college-eligible high school graduates." A. 3476. While all of the prerequisites for membership in the pool were a matter of dispute between the parties, that the University measured its desired number of black students against *Maryland* high school graduates who are qualified to attend the University is not a matter of dispute. That being true, it is obvious that awarding Banneker Scholarships to non-residents of Maryland is not narrowly tailored to correcting the condition that the University argues, that not enough qualified African-American Maryland residents attend at College Park. Cf. *Croson*, 488 U.S. at 508.

C. *Arbitrary Reference Pool*

The district court found the program to be narrowly tailored to increasing representation because an

---

[11]In 1992, for example, 17 of the 31 Banneker scholarships were awarded to non-residents of Maryland. Podberesky says without refutation that in 1989 a Banneker scholarship was offered to a Jamaican. Thus, the University gives African-American a hemispheric meaning.

increase in the number of high-achieving African-American students would remedy the underrepresentation problem. The district court so found because it reasoned that the Banneker Scholars would serve as mentors and role models for other African-American students, thereby attracting more African-American students. The Supreme Court has expressly rejected the role-model theory as a basis for implementing a race-conscious remedy, as do we. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion).

Furthermore, the district court's analysis of underrepresentation, although it relied on various academic criteria to determine eligibility, relied on each relevant criterion item by item instead of in combination. It is axiomatic that if all of the relevant criteria (270 verbal SAT score, 380 math SAT score, UMCP general course-curriculum requirements, and 2.0 GPA) were applied simultaneously, as indeed UMCP itself claims it most commonly does in determining admissions qualifications, the percentage of eligible Maryland residents who are African-American might well be significantly lower than the percentage satisfying the least burdensome of those criteria relied upon.[12] In other words, even within the confines of its own analysis, the district court's conclusion is based on flawed reasoning, and results in a

---

[12]This is because the least burdensome criterion for admission to UMCP is a limiting factor: no greater number of people can be accepted to UMCP than those satisfying this criterion, whichever one it is, in any given year. In point of fact, many of those satisfying this least burdensome criterion will fail to satisfy some or all of the other criteria, and thus will not be eligible to attend UMCP. Accordingly, the district court's failure to determine what percentage of the Maryland high school graduates were African-American and also satisfied all of these criteria, may well have inflated its determinations of the size of the relevant reference pool.

series of inconclusive and possible inflated figures regarding the makeup of the reference pool.

Moreover, and more important, eligibility is not the only relevant criterion in determining the reference pool in this case. We note the critical fact that application for admission to college is voluntary rather than obligatory. In addition, the choice of which institution to attend is voluntary, and is dependent upon many variables other than race-based considerations. Further, economic concerns and other factors, offered by Podberesky below, may induce many otherwise-eligible African-American high school graduates not to enter college in numbers which are proportionately higher than those of their non-African-American peers.

In short, the district court failed to account for statistics regarding that percentage of otherwise eligible African-American high school graduates who either (1) chose not to go to any college; (2) chose to apply only to out-of-state colleges; (3) chose to postpone application to a four-year institution for reasons relating to economics or otherwise, such as spending a year or so in a community college to save money; or (4) voluntarily limited their applications to Maryland's predominantly African-American institutions.[13] What if, for example, in some year only 2/3 of those academically eligible African-American Maryland high school graduates applied to any college, while 90% of eligible non-African-

---

[13]We can infer that significant numbers of UMCP-eligible Maryland African-Americans do choose to go to the predominantly African-American Maryland schools, such as Coppin State, Bowie State, and UM Eastern Shore, whether their reasons are economic, academic, geographic, or cultural, because the percentages of African-Americans in the student bodies at those schools are so high.

American Maryland high school graduates did? What then would be the relevance of measuring the percentage of those eligible against the percentage of African-Americans in the UMCP student body?

We will not speculate as to what extent these variables might reduce the size of the reference pool, since no definitive information regarding these types of statistics is in the record.[14] We can say with certainty, however, that the failure to account for these, and possibly other, nontrivial variables cannot withstand strict scrutiny. In analyzing underrepresentation, disparity between the composition of the student body and the composition of a reference pool is significant in this case only to the extent that it can be shown to be based on present effects of past discrimination. In more practical terms, the reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity. This the district court simply has not done. The result is no more than a collection of arbitrary figures upon which it held UMCP may rely in its efforts to recruit African-Americans using facially racial classifications.

---

[14]Although it is not necessary to this analysis, because the district court's conclusion on this point cannot withstand strict scrutiny for failure altogether to consider these variables, we are convinced, based on common sense and what evidence there is in the record that if these variables were accounted for in determining the relevant reference pool, the percentage of African-Americans in that pool would be lower than any figure postulated by the district court, and the disparity between UMCP's African-American population and that of the reference pool would be correspondingly reduced to a point where there might well be no statistically significant underrepresentation.

The Supreme Court has stated in *Croson*, which involved a 30% racial set-aside quota, that "the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U.S. at 507. Although the percentage of African-Americans that was expected to be in each entering class was disputed, see *supra* Part II.B., it is clear that the district court has implicitly approved the use by UMCP of a similar quota, because it "rests on ... unsupported assumption[s]," *Croson*, 488 U.S. at 502, as to the appropriate levels, if any, to remedy the present effects of past discrimination.

The district court has approved the use of the Banneker Program to affirmatively admit African-American students solely on the basis of race until the composition of African-Americans on the University campus reflects the percentage of African-American Maryland high school graduates who potentially might participate in higher education at UMCP, without an accurate determination of either the extent to which the present disparity exists, see *supra*, or the extent to which that disparity flows from past discrimination, see *supra* part I. The program thus could remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes. Without specific determination of what measure should be used, if any, to remedy the effects of past discrimination that still exist, "'relief' ... could extend until the percentage of [African-American students at UMCP] mirrored the percentage of [African-Americans] in the population as a whole." *Croson*, 488 U.S. at 498. We are thus of opinion that, as analyzed by the district court, the program more resembles outright racial balancing than a tailored remedy program. As such, it is not narrowly tailored to remedy past discrimination. In fact, it is not tailored at all.

D. *Race-Neutral Alternatives*

The district court also suggested that an increase in the number of high-achieving African-American students would remedy the low retention and graduation rates for African-American students at the University. Podberesky submitted a 1993 study by two University of Maryland professors which indicates that after the freshman year, in which grades are the principal problem, students leave the University for financial and other reasons.[15] Specifically, students who left the University "tended to be more likely to provide their own expenses, live off campus with long commutes, have a job with long hours, spend few free hours on campus, and have few friends on campus." Roger W. McIntire & Sandra Smith, *Work and Life Styles Among Dropouts and Ongoing College Students*, 4 J.A. 1062, 1067 (survey of 455 drop-out and 455 returning University of Maryland students). "[M]ales, minority groups and transfer students show greater attrition because they are more likely to provide their own expenses and have little time for campus activities and friends due to off campus living and work." 4 J.A. at 1068. That study suggests that the best remedy is "campus job opportunities and convenient, attractive, and economically reasonable *campus* housing ... available to a greater proportion of students." 4 J.A. at 1070-71.

The district court rejected Podberesky's argument because it found that, in addition to economic hardship,

[i]n given cases an absence of

---

[15]Students participating in the survey were asked to check a list of factors that were factors in their decisions to leave the University. We note that the students had the opportunity to choose that they "felt discriminated against due to race, gender, religion, or sexual preferences." 4 J.A. at 1075.

> commitment to the school because of its poor reputation in the community from which a student comes, the lack of shared experience with family members to help the student through the arduous process of higher education, the absence of African-American members of the faculty to serve as mentors and the existence of a hostile racial atmosphere on campus are other significant contributing factors.

838 F. Supp. at 1091-92.

The causes of the low retention rates submitted both by Podberesky and the University and found by the district court have little, if anything, to do with the banneker program. To the extent that the district court's opinion can be read as having found a connection between the University's poor reputation and hostile environment and the Banneker Program, it is on either a role model theory or a societal discrimination theory, neither of which can be sustained. In addition, there is no connection between the Banneker Program and shared experience with family members, African-American faculty members, or jobs and housing. Even if there is some connection between the two, the University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem. Thus, the University's choice of a race-exclusive merit scholarship program as a remedy cannot be sustained.

Because we find that the University has not shown that its programs and quota goals are narrowly tailored, we reverse the district court's grant of summary judgment to the University. We also reverse the district court's denial of Podberesky's summary judgment motion.

IV

In our first opinion in this case, we required that should no further evidence be available upon remand, summary judgment for Podberesky should be granted.

Simply put, since the summary judgment motion of the University has failed, it may be argued that we might well enter judgment in favor of Podberesky. Because such failure, however, has consisted at least in part of the district court's weighing evidence on a motion for summary judgment, and we expressed no opinion on the subject previously, we have not without more directed entry of judgment in favor of Podberesky. Instead, we have examined the Banneker Program and have concluded it is not narrowly tailored so as to justify its principal feature, which is its mandatory reliance on race as a qualification for participation therein.

The University has had two opportunities to justify its position and has failed.

Accordingly, on remand, the district court will enter its order denying the University's motion for summary judgment, granting Podberesky's motion for summary judgment, and requiring the University to re-examine Podberesky's admission to the Banneker Program as of the date it was made. On such re-examination, the University will be enjoined from enforcing that part of the qualifications for entry into the Banneker Program which require that the applicant be of

the African-American race. Following such re-examination, the district court will award appropriate relief if required.

The judgment of the district court is vacated, and the case is remanded for action consistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS.[*]

[*]Podberesky has not asked for relief against the intervenors who have been awarded Banneker scholarships prior to this decision therefore, none will be awarded against them except taxable costs and attorneys fees. Podberesky, also, has not asked for relief against any other student who has been awarded a Banneker scholarship prior to this decision; therefore, this decision has no effect on such students.

PUBLISHED

FILED: December 30, 1994

UNITED STATES COURTS OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-2527

DANIEL J. PODBERESKY,

Plaintiff-Appellant,

versus

WILLIAM E. KIRWAN, President of the University of Maryland at College Park; UNIVERSITY OF MARYLAND AT COLLEGE PARK (UMCP); MONICA GREEN; MAUDLYN GEORGE, on her own behalf and on behalf of her daughter Allison George; EILEEN HEATH; RICHARD A. DALGETTY; GERARD W. HENRY; MAISHA HERREN; ALETHA S. McRAE, on her own behalf and on behalf of her daughter Daletha McRae; CHARLES L. SMITH, III, on his own behalf and on behalf of his son Charles Smith, IV,

Defendants-Appellees.

EQUAL OPPORTUNITY FOUNDATION; AMERICAN COUNCIL ON EDUCATION; MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND; WILLIAM JULIUS WILSON, Doctor; ASSOCIATION FOR THE STUDY OF AFRO-AMERICAN LIFE AND HISTORY; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; UNITED STATES OF AMERICA,

Amici Curiae.

No. 93-2585

DANIEL J. PODBERESKY,

Plaintiff-Appellant,

versus

WILLIAM E. KIRWAN, President of the University of Maryland at College Park; UNIVERSITY OF MARYLAND AT COLLEGE PARK (UMCP); MONICA GREEN; MAUDLYN GEORGE, on her own behalf and on behalf of her daughter Allison George; EILEEN HEATH; RICHARD A. DALGETTY; GERARD W. HENRY; MAISHA HERREN; ALETHA S. McRAE, on her own behalf and on behalf of her daughter Daletha McRae; CHARLES L. SMITH, III, on his own behalf and on behalf of his son Charles Smith, IV,

Defendants-Appellees.

EQUAL OPPORTUNITY FOUNDATION; AMERICAN COUNCIL ON EDUCATION; MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND; WILLIAM JULIUS WILSON, Doctor; ASSOCIATION FOR THE STUDY OF AFRO-AMERICAN LIFE AND HISTORY; LAWYERS' COMMITTEEFOR CIVIL RIGHTS UNDER LAW; UNITED STATES OF AMERICA,

Amici Curiae.

ORDER

There having been two petitions for rehearing filed in this case, one by the defendants, Kirwan, et al., the other by the defendant-intervenors, Monica Green, et al, upon a request for a poll of the court on both of the petitions for rehearing en banc, there voted in favor of rehearing en banc Judges Ervin, Murnaghan and Michael, and there voted to deny rehearing en banc Judges Russell, Widener, Hall, Wilkinson, Wilkins, Niemeyer, Hamilton and Williams.

It is accordingly ADJUDGED and ORDERED that the petitions for rehearing en banc shall be, and they hereby are, denied.

The panel has considered the petitions for rehearing and is of opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that the petitions for rehearing shall be, and they hereby are, denied.

On account of a possible ambiguity, however, in the footnote on page 23 of the opinion, that footnote shall be, and it hereby is, re-written to read as follows:

> *Podberesky has not asked for relief against the intervenors who have been awarded Banneker scholarships prior to this decision, therefore, none will be awarded against them except taxable costs and attorneys fees. Podberesky, also, has not asked for relief against any other student who has been awarded a Banneker scholarship prior to this decision; therefore, this decision has no effect on such students. We note that attorneys' fees are not awarded as a matter

of course against unsuccessful intervenors, see Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989), and we express no opinion as to whether or not the district court should make such an award on remand.

With the concurrences of Judge Wilkins and Judge Hamilton.

/s/ H. E. Widener, Jr.
For the Court*

*Judges Luttig and Motz did not participate in this decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL J. PODBERESKY	*	
v.	*	Civil No.
	*	JFM-90-1685
	*	
WILLIAM E. KIRWAN,	*	
Presidentof the	*	
University of Maryland	*	
at College Park, and	*	
the University of	*	
Maryland at College Park	*	

****

OPINION

The question posed in this case is whether a public university, racially segregated by law for almost a century and actively resistant to integration for at least twenty years thereafter, may - after confronting the injustice of its past - voluntarily seek to remedy the resulting problems of its present, by spending one percent of its financial aid budget to provide scholarships to approximately thirty high-achieving African-American students each year.

The case is now before me on remand from the United States Court of Appeals for the Fourth Circuit. I previously upheld the Benjamin Banneker Scholarship Program, a scholarship program at the University of Maryland at College Park[1] open only to African

[1] I will refer to the University of Maryland at College Park throughout this opinion as "UMCP" "the University" or "College Park."

Americans. Podberesky v. Kirwan, 764 F. Supp. 364 (D. Md. 1991) (Podberesky I). In reversing my decision, the Fourth Circuit ruled that I had failed to make specific findings of present effects of past discrimination. It thus remanded the case for a determination on that issue. Podberesky v. Kirwan 956 F.2d 52 (4th Cir. 1992) (Podberesky II). After the remand, UMCP engaged in an administrative fact-finding process to decide whether to continue the Banneker Program. In April 1993, the University issued a Decision and Report in which it concluded that the Program should be continued. Thereafter, the parties engaged in additional discovery and, at the conclusion of the discovery, filed cross-motions for summary judgment. Those motions were argued on October 22, 1993 and are now ripe for decision.[2]

I.

Banneker scholarships currently provide full financial support for four years of study at UMCP. The most recent data available in the record as to the value of a Banneker scholarship is for the 1990-91 academic year. That year the scholarships awarded to in-state students were valued at $7,571 per year and the scholarships awarded to out-of-state students were valued at $11,627 per year. The aggregate annual cost of the Banneker

---

[2] William E. Kirwan and the University of Maryland at College Park are both named as defendants. I have referred to them collectively as "UMCP" throughout this Opinion. Several Banneker scholars and their parents have intervened as defendants and are referred to in their capacity as such. The United States has also filed an amicus brief in support of the Banneker Program.

program during the 1990-91 school year was $594,351. It accounted for approximately one percent of UMCP's total financial aid budget. Def. Ex. 6 at 9.

The scholarships are awarded each year to black high school seniors on the basis of merit. In the fall of 1990, the minimum eligibility requirements were a 900 S.A.T. score and a 3.0 grade point average. Plaintiff met these requirements, having scored 1340 on the S.A.T. exam and having maintained an unweighted grade point average of 3.56. He applied for a Banneker scholarship but was not considered because he is not African-American. Twenty-eight Banneker scholarships were ultimately awarded to students entering UMCP in the fall of 1990. A total of 3145 freshmen were admitted that year.

II.

The history of African-American higher education in Maryland before Brown v. Board of Education is typical of most southern states. Maryland's policy towards the education of its black citizens was characterized by the reluctant establishment of institutions of higher education for blacks that were segregated, vastly underfunded and consistently neglected.[3] As a result, when the State Commission on the Higher Education of Negroes investigated the conditions in the state's black colleges in 1937, it documented dramatic funding disparities and drastically inferior facilities and curricula in every major field, including teacher education, agricultural and vocational education, liberal

---

[3] Def. Ex. 70 at 137-54. Even federal land grant funds, which were specifically designated for Maryland's black colleges, were diverted to white schools. Id. at 141 n. 366.

arts, fine arts, graduate and professional training, and extension opportunities. In light of this evidence the Commission concluded that the state "had failed to make adequate provision for Negroes."[4]

By the late 1930s, the state was under pressure, mainly from the National Association For the Advancement of Colored People, to equalize the quality of its educational institutions in order to comply with the constitutional requirements articulated by the Supreme Court in Plessy v. Ferguson.[5] In 1945, the Maryland Commission on Higher Education recommended that African-Americans be admitted to the state's all-white graduate schools and that funding for all-black colleges be increased to parity with that of the white schools. Harry "Curley" Byrd, President of the University of Maryland from 1935 until 1953, agreed that funding should be equalized[6] but was vehemently opposed to integrating the University's graduate and professional schools: "Admission [of African-Americans] to the Graduate School would mean admission to College Park, and would destroy the very segregation [sic] idea for the

---

[4] Id. at 146.

[5] 163 U.S. 537 (1896). For information about the NAACP's campaign to desegregate Maryland's primary, secondary and postsecondary schools, see Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925-1950 at 54-68 (1987).

[6] "If we don't do something about Princess Anne," Byrd said in 1937, referring to what at the time was the only state funded black college in Maryland, "we're going to have to accept Negroes at College Park, where our girls are." Def. Ex. 70 at 147.

undergraduate school."[7] In 1949, Byrd recommended privatizing UMCP rather than allowing black graduate students to enroll there.[8] However, against the background of the two Supreme Court decisions requiring the admission of black students to segregated graduate schools in Oklahoma and Texas,[9] Byrd's suggestion was rejected and UMCP admitted its first black graduate student in 1951.[10] Any further debate over the propriety of integrating the University of Maryland system was mooted by Brown v. Board of Education.

Maryland's reaction to Brown was restrained but unenthusiastic. Unlike other states where schools had been segregated by law, there was no policy of massive resistance and, in June of 1954, the University's Board of Regents agreed to admit "all residents of Maryland without regard to race."[11] However, the state did little to promote integration. The Board of Regents, like the governing bodies of many other segregated state schools, pledged to admit black students, but imposed new admissions standards and required standardized testing of all applicants. Such requirements served to exclude African-Americans who might have otherwise been

---

[7] Id. at 152.

[8] Id.

[9] Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

[10] Def. Ex. 70 at 154.

[11] Def. Ex. 70 at 158.

admitted during the first years after Brown.[12] Similarly, in 1960, when the Governor proposed a complex plan to accommodate the growth of UMCP by converting several regional state colleges into additional branches of the flagship campus, no all-black colleges were considered for conversion, thus preserving the segregated character of College Park.[13] Most importantly, UMCP simply made no effort to recruit African-American students. As the Board of Trustees of the Maryland State Colleges reported in 1969, "it is only recently that formerly White colleges [have] made more than perfunctory efforts at other race recruitment."[14] The result of this neglect was not surprising: "For a vast majority of parents and students the question of race simply does not arise. Rather, it is generally taken for granted by both black and white students and parents that the choice [of which college a student attends] takes place within the framework of colleges of one's own race."[15]

Not only did UMCP's administration fail to take steps to integrate its campus in the decade and a half after Brown, it also failed to offer a particularly sympathetic ear to the concerns of the few African-American students who attended the University in the late fifties and early sixties. In 1963, a faculty committee refused to allow

---

[12] Id. at 158.

[13] Report of the Governor's Commission to Study the Problem of the Expansion of the University of Maryland (1960).

[14] A Study of Racial Integration in the Maryland State College System at 13 (1969).

[15] Id. at 5.

students to form an on-campus chapter of the Congress for Racial Equality. The following year the University discouraged Martin Luther King, Jr. from speaking on campus, and, that same year, the Dean of Student Life forbade campus chaplains from participating in civil rights activities.[16]

The environment in which black students found themselves during the early 1960s was notably inhospitable. The University, despite its worries about the effect that Dr. King's presence on campus might have, permitted George Wallace to speak at the school in 1964. According to University historian George Callcott, Wallace attracted the largest crowd in the history of the University. "The emotional intensity" of the eight thousand students, Callcott wrote, "exceeded that of a football game."[17] Off-campus housing was completely segregated and when an integrated dormitory was established for a summer "citizenship" program in 1966, the Ku Klux Klan marched in protest.[18] Considering UMCP's institutional indifference to integration and the hostility of the campus climate, it is not surprising that black student enrollment stayed below 1% of the undergraduate population from 1954 until the end of the 1960s.[19]

---

[16] Def. Ex. 70 at 160.

[17] Callcott, A History of the University of Maryland at 394-95 (1966).

[18] Def. Ex. 101, ¶ 4.

[19] Def. Ex. 70 at 161.

In 1968, the United States Department of Health, Education and Welfare's Office of Civil Rights (OCR) began pressuring the state of Maryland to integrate its institutions of higher learning.[20] The University responded by establishing the Committee on Meaningful Integration.[21] The initial recruitment plan proposed by the University offered enhanced academic programs at UMCP in order to attract African-American students from the state's predominantly black colleges.

Events between 1970, when the plan was proposed, and 1973, when OCR rejected the plan as "ineffectual", demonstrated that the University was not committed to the "meaningful" integration that the name of the Committee promised.[22] The University did not increase its financial aid expenditures to meet the needs of black students most of whom came from low or moderate income families.[23] Increased efforts to integrate UMCP's dormitories, though ultimately successful, were met with resistance from the University's Director of Housing, particularly over the issue of recruiting minority students to be resident assistants.[24] The University failed to provide

---

[20] Def. Ex. 71.

[21] The name of the Committee seems to be a rather candid admission of the University's past failings.

[22] Def. Ex. 79.

[23] Def. Ex. 70 at 178.

[24] The Director of Housing believed that setting aside dorm rooms for black students violated Title IV, and she admitted to changing the academic standing requirements for employment as a resident assistant when African-American students applied. Def. Ex. 70 at 184-85.

financial support for the building of black fraternity and sorority houses even though it had spent a million dollars to build ten white fraternities and sororities on campus during the late fifties and early sixties.[25] Similarly, the facilities used to house black students programs, such as the black cultural center and the Intensive Educational Development Program, were substandard with inadequate heating and broken toilets.[26] In 1972, Vice Chancellor Bratton, who had administrative control over the Office of Minority Student Education (OMSE), spoke of the difficulty of getting funding for programs aimed at recruiting and retaining African-Americans:

> Several of my colleagues, both within Student Affairs and the campus central administration, showed either naivete or resistance to the creation of a viable minority student affairs operation. Even now, including salaries, this office [OMSE] has only a $42,000 budget and this was literally drawn from the foot-kicking hides of everyone. My own staff deeply resent d the transference of lines to create this operation[27] and my experience with the budget committee when I went to them for all of $7000 for this effort still leaves me despondent. $42,000 is only .004% of the

---

[25] Id. at 168.

[26] Id. at 220-21.

[27] Rather than establishing OMSE from whole cloth, UMCP created it by transferring personnel away from other programs aimed at recruiting African-Americans. Id. at 194-99.

> student affairs budget and .0005% of the campus budget and the reaction was unworthy of professional educators.[28]

As if UMCP's financial neglect of the needs of African-American undergraduates was not enough of an obstacle to black recruiting, the University's disinterest in attracting black students spilled over into the Admissions Office. The administration refused to establish a separate office of minority recruitment and provided only partial funding for the recently created Equal Opportunity Recruitment Program within the Admissions Office. Moreover, the Admissions Office itself was not particularly sympathetic to the cause of recruiting black students. As one black administrator wrote to the Chancellor of the University in 1972:

> The admissions counselors who have addressed themselves to minority recruitment find themselves working in an environment which is increasingly repressive and hostile. The hostility has reached such a level that the counselors without exception request their operation be placed in a different division of the University.[29]

Indeed, this hostility towards minority recruitment existed at the highest levels of the University administration. When the Chancellor's Committee on Minority Education pressured UMCP to step up minority recruitment and retention efforts and to increase the amount of financial

---

[28] Id. at 193.

[29] Id. at 187, quoting Jan. 5, 1972 letter, Meldon Hollis to Chancellor Bishop.

aid available to minority students, the administration dismissed the Committee's report as "abusive, fuzzy, non-realistic and non-constructive" with recommendations that "sound like a parody."[30]

In 1973, OCR rejected the 1970 Plan, concluding that, after three years, it was not successfully desegregating UMCP. OCR pointed out that the colleges in the Maryland State University system still retained duplicative programs and that the areas of specialization at historically black colleges reflected stereotypical notions of what were considered appropriate careers for African-Americans.[31] The entire Maryland system of

---

[30] Def. Ex. 70 at 204. Ironically, some of the Committee's "abusive, fuzzy, non-realistic and non-constructive" recommendations, such as specific numerical goals for African-American enrollment, were adopted a year later in the University's 1973 Desegregation Plan. Id. at 207.

[31] For example, under the 1970 Plan, while UMCP retained its status as the only state funded institution in Maryland offering doctoral and professional programs, and the historically white Towson State received programs that provided "an excellent background for many careers such as law, public relations, business, communications media, sales and management", the state's traditionally black colleges were given undergraduate programs designed to train their students to work within a population of criminals and persons with mental and physical deficiencies. Bowie State College offered a social work program "with special emphasis on socially and emotionally disturbed, delinquent, mentally retarded, physically ill or handicapped children or adults." Coppin State offered an "Industrial Arts Program" as well as "Correctional Education Program to focus on the large percentage of illiterates sentenced to correctional facilities." Morgan State offered a "Community Mental Health Program with an opportunity for lower-echelon workers at State institutions to

higher education could not be expected to desegregate, OCR wrote, while the traditionally black colleges offered specialization in areas that were notably less attractive than the programs at the state's white universities.[32] In some instances, the state seemed to be hindering the interaction of students of different races. The state, for example, set up a cooperative engineering program wherein students at the traditionally black Morgan State would take two years of courses towards an engineering degree at New York University despite the fact that the same program could have been arranged using UMCP's college of engineering.[33]

After the rejection of the 1970 Plan, the state produced a new plan, proposing to increase efforts at minority recruitment, eliminate duplicative academic programs within the state, and set specific minority recruitment goals for UMCP.[34] This revised plan was accepted in 1974, but a year later OCR threatened to start proceedings to terminate the state's federal education funding because "Maryland has repeatedly failed to act in a manner which would indicate that it is executing the Plan promptly and vigorously."[35] The state successfully enjoined these proceedings until OCR promulgated guidelines setting forth specific standards for Title VI

---

upgrade their training with a focus particularly on preparation for work in an inner city context." Def-Int. Ex. 7 at 5-6.

[32] Def. Ex. 79.

[33] Id.

[34] Def. Ex. 70 at 208-209.

[35] Def-Int. Ex. 12.

compliance.[36]

Even as the 1973 Plan was being implemented and as OCR developed criteria for Title VI compliance, the University took actions that hindered its own efforts at desegregation. The Office of Minority Student Education was downgraded and its various components were transferred to other administrative units of the University.[37] In 1978 the University's Board of Regents approved a "Master Plan" for the University of Maryland system. Under this plan UMCP was to deemphasize the remedial aspects of its curriculum, reduce the size of the incoming freshmen class by emphasizing "quality over quantity", and concentrate its resources on upper level education. Despite the 1973 Desegregation Plan's goals for increased minority admissions, the Master Plan assumed that minority enrollment would remain stable. Nor did the Master Plan make any provisions for recruiting minority students or consider the adverse impact on African-American enrollment that UMCP's new admissions requirements would have.[38] Not surprisingly, in 1978, after developing criteria for Title VI compliance, OCR once again concluded that Maryland was not taking sufficient action to desegregate its institutions of higher learning.[39]

In 1980 the State voluntarily submitted a fourth

---

[36] Mandel v. HEW, 411 F. Supp. 542 (D. Md. 1976).

[37] Def. Ex. 70 at 211-14.

[38] Id. at 239-40.

[39] Def-Int. Ex. 14.

compliance plan to OCR. In its 1980 Plan, UMCP revised its goals downward for the 1980 to 1985 time period. The State began setting its numeric goals for "other races" in terms of percentages of "first-time, full-time freshmen" rather than as percentages of the total pool of undergraduates. Thus, when UMCP set a range of 10% to 12% as its 1985 goal for other-race freshmen, that number was substantially lower than the 1974 Plan's 13-16% figure for all undergraduates by 1980. The decision to focus on "first-time, full-time freshmen" was a curious one, given that the state recognized retention problems as possibly "the single most important equal educational opportunity issue facing the public higher education institutions in the State." OCR staff concluded that Maryland's submission did not amount to an honest attempt to meet Title VI:

> [T]he State has adopted enrollment goals which would cause some schools to be more racially identifiable in 1985 than they are now; has not moved to establish formal institutional missions which would distinguish one school from another on any basis other than the race of the students for whom the various schools originally were established; and has provided no specific steps which it will take to improve, enhance and enrich its TBIs [Traditionally Black Institutions] and therefore to assure equal educational opportunities for the students who attend those schools.[40]

OCR and the State continued negotiating and in 1985 the State submitted yet a fifth plan (the "1985-89 Plan"). The new Plan included specific reliance on the Benjamin Banneker Scholarship Program as one of UMCP's most important recruitment efforts:

---

[40]Def-Int. Ex. 16 at 12.

> The Benjamin Banneker Scholarship Program has been a valuable asset in the Campus's efforts to recruit academically talented Black students. This program[,] which began in 1978, originally provided two-year scholarships with stipends of $1,000 per year. This scholarship has been expanded for a duration of four years for each recipient. For 1985-1989, these scholarships will be continued with approximately 20 new winners named each year.

On June 3, 1985 OCR accepted the 1985-89 Plan as "compliance with Title VI for the life of the plan."[41]

The 1985-89 Plan expired in June 1990. Maryland officials have issued their report on the 1985 Plan and are waiting for an OCR inspection to determine whether the State is finally in compliance with Title VI. Until this OCR inspection is completed[42] --and until OCR notifies the State that it is finally in compliance with Title VI--the

---

[41] In 1978, when the University first implemented the Banneker Program, it consisted of two year scholarships with stipends of $1000 per year. These scholarships were available to all "minority students." Def-Int. Ex. 20. The University found that, funded at this level, the scholarship was not accomplishing its goal of attracting high-achieving African-American students to UMCP. Accordingly, in 1988, UMCP increased the value of the scholarship and limited it to African-Americans. Pl. Ex. 25.

[42] There is no evidence in the record indicating whether OCR has completed its evaluation of the 1985 Plan. However, the United States' amicus brief argues that Maryland still operates a dual system of higher education even if it has made progress towards eliminating the vestiges of its past discrimination.

State has stated its intention to continue to abide by the 1985-89 Plan.

Between 1954 and 1978, when the Banneker Program was instituted, the number of African-American undergraduates at UMCP grew from none to nearly 2000, making up 7.2% of the undergraduate population by 1978.[43] In many ways, this growth took place despite the actions of the University. Whether manifested by the overtly racist comments of "Curley" Byrd, the absolute neglect of black recruiting during the sixties, the underfunding of African-American facilities, the institutional hostility towards the administrative units at UMCP responsible for desegregation, or the constant squabbling with the OCR, the University demonstrated at worst contempt for and at best grudging acceptance of its constitutional obligation to desegregate. It was only in the late 1970s, with the advent of the Banneker Program, that UMCP finally began to take meaningful steps towards integrating its campus. Indeed, it is only since the late 1980s that the University has made any genuine progress towards eliminating its single race status.[44]

III.

Since William Kirwan became president of UMCP fifteen years ago, the University has earnestly taken steps

---

[43] Def. Mem. at 11.

[44] It took the University from 1975 to 1983 to increase its black enrollment from 6.8% to 8.1%. Later in the decade, the same 1.3% increase took only two years -- between 1988 and 1990 the percentage of black undergraduates increased from 9.9 percent to 11.2%. Def. Mem. at 11.

to remedy its history of segregation. Its efforts have born fruit. African-American matriculation rates have slowly edged up so that blacks made up approximately 15% of the freshman class entering UMCP in the fall of 1993.[45] Additionally, in 1990, UMCP ranked fourth among predominantly white universities in terms of the number of African-American students receiving degrees.[46]

Despite these accomplishments, UMCP's April 1993 Decision and Report (the "D&R") concluded that the Banneker Program should be continued. The D&R first identified four effects of the University's past discrimination which persist into the present: (1) a poor reputation of the university in the African-American community, particularly among parents and high school counselors who influence students' college choices; (2) underrepresentation of African-Americans in the student population; (3) low retention and graduation rates of African-Americans; and (4) perceptions of a campus climate that is hostile to African-Americans. The D&R next found that the Banneker Program has been successful in helping to overcome these vestiges of discrimination and that alternative remedies, specifically race-neutral merit scholarships or expanded need-based financial aid,

---

[45] UMCP Office of Institutional Studies, Student Enrollment Rates, October 5, 1993. In fact, the percentage of black instate first-time, full-time freshmen has fluctuated over the last six years. The percentages are as follows: 1992 (10.38%), 1991 (13.7%), 1990 (14.2%), '989 (15.2%), 1988 (13.3%). Def-Int. Ex. 37.

[46] It is worth noting, however, that UMCP's African-American graduation rate, when measured as a percentage of the entire graduating class, ranked 29th among traditionally white colleges. In 1990, 6.3% of UMCP's graduates were black. Pl. Ex. 62.

would not be similarly efficacious. Finally, the D&R required that the Banneker Program be reviewed and evaluated at least once every three years to determine whether its goals have been achieved and whether it should be continued.[47]

IV.

The Fourth Circuit affirmed my prior ruling that the Banneker Program must be subjected to a strict scrutiny test under the equal protection clause of the Fourteenth Amendment. Accordingly, the Program must serve "a compelling governmental interest" and must be "narrowly tailored to the achievement of that goal." Podberesky II, 956 F.2d at 55. The Fourth Circuit explained that in order to meet the "compelling governmental interest" element of the test, defendants must show that there is a "strong evidentiary basis for concluding that remedial action is necessary." The Court did not define precisely what a "strong evidentiary basis" is but plaintiff concedes that the standard is somewhat less than a preponderance of the evidence. The present effects of past discrimination need not be widespread or pervasive. There must only be "strong" evidence of "some" present effects. Id. at 57. Thus, if there is a strong evidentiary basis for any one of the four present effects of past discrimination which UMCP found to

---

[47] It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy. All other matters aside, UMCP administrators are to be commended for the moral courage that they have demonstrated in undertaking this self-examination with an admirable degree of candor.

exist, that would be sufficient to sustain the Banneker Program.[48] For the reasons which follow, I am of the view that all four of UMCP's findings are supported by strong evidence.[49]

---

[48] To pass constitutional muster, affirmative action programs must also be narrowly tailored. Podberesky II, 956 F.2d at 55. See infra section V.

[49] The parties furiously debate the meaning of the phrase "strong evidentiary basis." In the final analysis, after the smoke has cleared, it appears that plaintiff contends that the standard is "somewhat less than a preponderance of the evidence" while defendants say it is the functional equivalent of the "substantial evidence" test. The Fourth Circuit has described the latter as either "less than a preponderance but more than a scintilla" or as enough evidence "as a reasonable mind might accept as adequate to support a conclusion and ... sufficient to justify a refusal to direct a verdict were the case before a jury." Laws v. Celebrezze, 368 F.2d 640 (4th Cir. 1966); Teague v. Califano, 560 F.2d 615 (4th Cir. 1977).

Ultimately, what is significant is that both sides agree that defendants' burden is to produce something less than the preponderance of the evidence. This standard is compatible with the Supreme Court's desire to "smoke out" and prohibit "racial politics" without preventing local governments from voluntarily eliminating the vestiges of past discrimination. City of Richmond v. Croson, 488 U.S. 467, 493 (1989); Wygant v. Jackson Board of Education, 476 U.S. 267, 290-92 (1986) (O'Connor, J., concurring). Further, this standard of evidence comports with language in Croson that states that the standard should not be so strict as to render every affirmative action program unconstitutional. Croson, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in judgment) ("[A] rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents. . . ."). Thus, placing an evidentiary burden upon the defendant that is "somewhat less" then a preponderance of the evidence, reconciles the Supreme Court's desire to subject the rationale of affirmative action programs to strict scrutiny without chilling the states' ability to voluntarily eliminate the results

---

of its past discriminatory actions. See Id. at 518 (Kennedy, J., concurring in part and concurring in judgment) ("[T]he State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself.").

I hold below that UMCP has a strong basis in evidence for finding that there exist four present effects of past discrimination: 1) UMCP's bad reputation in the African-American community, 2) underrepresentation of African-Americans in UMCP's student body, 3) African-Americans' disproportionally low retention and graduation rates, and 4) the existence of a hostile racial climate at UMCP. To the extent that reasonable minds may differ over whether these conditions exist or whether they are linked to UMCP's past discrimination, it is important to remember what UMCP's burden of production is. They need not prove these present effects of past discrimination beyond a reasonable doubt, by clear and convincing evidence, or even by a preponderance of the evidence. The standard they must meet is less than a preponderance of the evidence. To require any greater a standard would be in explicit contradiction of the Court's requirement in Croson that the burden of persuasion remain with the plaintiff in reverse discrimination cases. 488 U.S. at 500.

I should further note that the language which I later employ in upholding UMCP's findings could be interpreted as suggesting that defendants bear the ultimate burden of proof. In fact, if that were so, I would still find that defendants are entitled to summary judgment. However, in a reverse discrimination case such as this the burden of persuasion always remains with the plaintiff. Croson. 488 U.S. at 500. Thus, while plaintiff has challenged the evidence relied upon by UMCP, he has not produced any persuasive affirmative evidence in support of his position. This absence of evidence makes defendants' entitlement to summary judgment even more clear. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) ("[T]he plain language of Rule 56(c) mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

A.

The first present effect of past discrimination found by UMCP in its Decision and Report is the University's continuing poor reputation in the African-American community, particularly among parents, high school counselors and prospective students.

1. The Evidence Relied Upon By UMCP

As part of the process leading to the issuance of its Decision and Report, UMCP commissioned an evaluation of the Banneker Program by Walter R. Allen, a sociology professor at the University of California - Los Angeles.[50] Allen, in preparing his study, interviewed high school guidance counselors and conducted four student focus groups. One counselor told Allen that in the past the University "wasn't a friendly place for Blacks to be. They didn't want you to be there." Another said: "I don't feel good about College Park... yet." The students confirmed that these impressions were conveyed to them by their elders. According to Allen, "the single most

---

sufficient to establish the essential element to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.") (quoting Fed. R. Civ. P. 56(c)).

[50] "The Benjamin Banneker Scholars Program For High-Achieving African-American Students At The University Of Maryland - College Park: An Evaluation Study ("The Allen Report"). Def. Ex. 6.

vivid image they had of College Park prior to attending the campus was that it was an all-white university.' This common perception they said, was the university's 'reputation.'" Id. at 34. Thus, Allen concluded that UMCP "is in large degree burdened by its history when it comes to recruiting Black students." Id. at 30.

Joe R. Feagin, a race relations consultant, prepared two reports for UMCP, one focusing on the views of African-American parents and the other on the views of African-American students.[51] The first report was based upon a series of focus groups consisting of black parents of college age children. Eighty-three percent of the participants in these groups indicated on an exit questionnaire that the reputation of UMCP is "mostly negative" or "somewhat negative." Feagin Report I, at 7. Seventy-six of the parents "tended to agree" or "strongly agreed" that "in the past, historically, the University of Maryland at College Park has done a poor job of serving the black community and black students." Individual comments made during the course of the focus group proceedings confirmed these views. For example, in one of the focus groups of African-American parents, the following exchange occurred:

> Black parent (male): I'm old enough, I'm old enough to remember when practically every teacher in... Maryland graduated from Morgan. You know so it wasn't a lot of options at one time, you know.

---

[51] "Black Students At The University Of Maryland (College Park): The Views Of Black Parents In Maryland" (Feagin Report I), Def. Ex. 7. Feagin, "Black In A White World: Black Students At The University Of Maryland College Park)" (Feagin Report II), Def. Ex. 13.

> Black parent (male): Looking back I was raised here, and I've been in Montgomery County most of my life, and I can remember people applying to University of Maryland, and they would be referred to, because of their race, you know, wouldn't you be more comfortable at Maryland State, which was the university at Eastern Shore, or Morgan, or Bowie. They would invariably try to refer you to a black school.
>
> Black parent (female): It is, that's true. It's true it is. They would do that. If you go to them they would refer or they would recommend or suggest that you go to another college.

Feagin Report I, at 13-14. Similarly, the remarks of one of the participants in a student focus group illustrate the importance that the perceptions of parents play in forming their children's views of UMCP.

> I had so many like people my parents age and people older than that going, "Oh girl don't go there" you know people just telling me that it was the worst place for me to go. "Go to UMBC. Go to _____." Well Eastern Shore was the one they kept telling me to go to since it's predominantly black. . . . [Focus group leader: Do you know what made them say that?] Well, College Park didn't have it's first student, I think it was a graduate student, till like the mid-sixties. The first black student, I mean, and the environment just wasn't conducive I guess to black students. So it's just the kind of thing that we knew we weren't wanted here. I guess that's what they meant.

Feagin Report II, at 9-10.

The experience of UMCP officials involved in recruiting black students provides equally solid evidence of University's poor reputation among African-Americans. James Newton, the Acting Assistant to the Vice-President of Academic Affairs at UMCP, has stated:

> I was born in 1947, and until 1975 I had never set foot on the College Park campus, even though I lived only 34 miles away. I was familiar with College Park's history as a segregated campus: I heard stories from my wife's sisters, who are black, about College Park as the institution that told them they were not welcome as graduate students there and as the institution that received funding from a State that sent my in-laws to go to graduate school in New York rather than allowing them to attend UMCP. I did not regard the College Park campus as a place that would welcome me as a black student or a black teacher.
> . .
>
> It was during my one year at UMCP that I learned first hand about the way teachers, administrators and students in Baltimore City perceived UMCP. I spoke to those individuals in my capacity as a UMCP recruiter. I was told by many teachers, principals and counselors that they were not welcome in the 1950's to perform graduate work at the College Park campus. These individuals, of course, were the ones who were advising black students in 1976 (and in some cases still are rendering that advice today) on the colleges these students should attend. Almost

> invariably, the college would not be College Park. Those students would be encouraged instead to attend one of the State's historically black colleges because these high school principals and counselors did not feel that blacks would do well or be welcomed at UMCP. The principals and counselors with whom I spoke expressed the fear that blacks would not be treated fairly by faculty, who in many instances exhibited negative expectations toward black students. For these reasons, principals and counselors simply did not believe that the black students in their schools could be successful at UMCP. Even though I tried to point out the opportunities available at College Park for black students, the administrators I spoke to were not telling the students to look at College Park because they believed it was not a good place to go based on their own, negative experiences, and based on similar experiences of their former students, whose feedback over the years indicated that life at UMCP for blacks had not significantly changed over time.

Def. Ex. 10, ¶¶ 6 and 8.

To similar effect is the affidavit testimony of Mary E. Cothran, Director of the Office of Multi-Ethnic Student Education at UMCP.

> In 1980, when I began working in undergraduate admissions, one of the top priorities at UMCP was to increase the presence of blacks in the student body and enhance their experiences. This was no small task, particularly because the community perceptions at that time were that UMCP was not open to or supportive of black students. The African-American community, including but not limited to Montgomery County civic groups and public school groups, did not believe that black students would do well at UMCP. Many of the high school counselors and community leaders with whom I spoke encouraged black high school students to attend other schools rather than the University of Maryland because of this school's history of segregation. As stated earlier, it was mainly parents, counselors and students from outside Maryland who perceived UMCP as a positive educational environment. . .

Def. Ex. 11, ¶ 7.

Linda Clement, the Director of Undergraduate Admissions at the University, concurs:

> The University's history of segregation continues to affect its ability to recruit Black students. Parents, counselors and others who influence the student's choice of undergraduate institutions recall that history. Such notoriety continues to impact reputation; reputation once developed is difficult to modify, especially in significant ways. The Banneker Program is a concrete rebuttal to charges that the University's commitment is superficial or rhetorical. Without it, not only will the

> University's desegregation efforts be severely hampered and some of the results be eliminated, but the University's diversity efforts will similarly be retarded. Of necessity, desegregation and diversity goals overlap in the function of this University.

Def. Ex. 9, ¶ 33.

2. Plaintiff's Arguments

The arguments that plaintiff advances in an effort to overcome this evidence are insubstantial. First, he presents evidence of his own intended to show that UMCP does not have a bad reputation among African-Americans: two surveys of black high school students, one survey of African-American students at UMCP, response cards mailed in by students who have decided not to attend UMCP and the affidavit of John Roth, a counselor at the high school that plaintiff attended. The surveys, conducted by a high school junior, a sophomore architecture and government major at UMCP, and a freshman at Montgomery College, are methodologically flawed because they are not taken from truly random samples of students and because the surveyors made no effort to follow up on the responses. The information provided by the response cards is of little value in this context since it asks no questions designed to elicit relevant information. While Roth may sincerely hold the views that he expresses, it does not contradict the contrary views expressed by many other counselors and parents and the actual experience of UMCP officials responsible for recruitment. In any event, in determining the constitutionality of the Banneker scholarships, the question is not whether plaintiff can find some scatterings

of information to support his position but whether there is a strong evidentiary basis for the conclusions reached by UMCP.

Second, plaintiff posits that a review of the transcripts of the various focus groups upon which the Allen and Feagin Reports are based discloses (1) that researchers asked questions designed to elicit negative responses about UMCP, and (2) that, nevertheless, positive statements about the University were made. It may be fair to say that in writing the body of their reports neither Allen nor Feagin (particularly the latter) appears to have been self-critical about his own biases and predispositions. It may also be in the nature of focus groups to generate self-perpetuating momentum. However, the transcripts do not reveal that unfair leading questions were asked as a means of obtaining slanted responses. Moreover, plaintiff has cited only one example of an allegedly positive remark about the University; it related to UMCP's reputation as a place for black athletes to go to "prepare for professional sports." Pl. Ex. 47 at 28.

Third, plaintiff baldly asserts that the evidence does not establish any causal link between past discrimination and the University's present poor reputation among African-Americans. Given the University's history of discrimination, this assertion defies belief. It is also specifically belied by statements made by participants in the focus groups and by the experience of UMCP officials responsible for recruitment of African-Americans.

Fourth, plaintiff contends that since African-Americans are not underrepresented at UMCP, any poor reputation that the University may have is of no practical

effect. This contention erroneously assumes (as discussed infra section IV.B.) that African-Americans are not underrepresented at UMCP. Moreover, even if African-Americans were not statistically underrepresented at College Park, the existence of the University's poor reputation among African-Americans would nevertheless have an adverse effect by reducing the pool of black students from which it can draw. This would have the strong potential effect of decreasing the number of high-achieving African-American students at College Park, contributing to racial stereotyping that perpetuates an adverse racial climate which, in turn, hampers UMCP's efforts to retain African-American students.

Finally, plaintiff cites two cases, Burnet v. City of Columbia, 1 F.3d 390 (6th Cir. 1993) and Hammon v. Barr, 813 F.2d 412 (D.C. Cir., 1987), as standing for the proposition that racial discrimination that occurred many years in the past cannot, as a matter of law, be found to cause present effects. If that were the law, then the Fourth Circuit has asked me to engage in an academic exercise on remand. In any event, plaintiff misreads Burnet and Hammon. All that these cases held was that under the particular facts presented, the past discrimination was too remote to support a finding of present effects. Here, the evidence is overwhelming that a poor reputation of UMCP among African-Americans persists.[52]

---

[52] Plaintiff also argues that UMCP's reputation in the African-American community is no worse than the reputation of any other predominantly white university, whether or not it has a history of de jure segregation. Thus, plaintiff claims, it is impossible to link UMCP's bad reputation to its past discrimination rather than to some present societal force that

B.

The second present effect of past discrimination that UMCP has found to exist is the underrepresentation of African-Americans in its student body. The historical data behind the finding is succinct, startling and undisputed. "Prior to 1954, there were virtually no African-American students on campus. The end of de jure segregation produced no visible changes. As late as 1969, fifteen years after Brown was decided, fewer than 1% of the students at the University were African-American. In 1970, 3.4% of the University's full-time undergraduates were African-American; in 1975, 6.8%; in 1980, 7.5%; in 1985, 8.6%; in 1990, 11.2%." Decision and Report at 15-16. The percentages of incoming freshmen at UMCP who have been African-American are comparable, ranging from 6.6% in 1974 (the first year in which that statistic was kept) to 10.5% in 1985. Because of the efforts that the University has been making, this figure increased to 15% in 1990. It dropped to 13% and 11.3% in 1991 and 1992, respectively, but again reached 15% in 1993. Def. Ex. 72.

1. Selection of a Reference Pool

The question of underrepresentation requires, of course, the selection of a reference pool of eligible candidates against which the level of representation can be measured. Croson, 488 U.S. at 501-02. Maryland Troopers Association, Inc. v. Evans, 993 F.2d 1072 (4th Cir. 1993). Plaintiff alleges that the

---

affects both northern and southern universities. For the reasons stated below, infra section IV.B.2, I find this comparative argument to be wholly without merit.

reference pool should be composed of graduating high school seniors who meet all of what he alleges to be the minimum requirements for admission to UMCP: completion of the required high school course curriculum, maintenance of a 2.0 grade point average and attaining a verbal S.A.T. score of 270 and a math S.A.T. score of 380. UMCP has not presented evidence of the percentage (in relation to all graduating high school seniors in Maryland) of African-American students who have met all four of these requirements, and thus, according to plaintiff, UMCP has not met its burden of proving that African-American students are underrepresented in the student body.

An affidavit submitted by UMCP's Director of Admissions as well as the University's published Policy on Admissions, establish that, in fact, the University does not have rigid minimum admissions requirements. Def. Ex. 9, ¶ 6. Def. Ex. 108. Thus, the class of potential applicants defined by plaintiff is artificial. Focusing upon the 1991-92 year - the period for which the most extensive data is available - UMCP recites a number of statistics suggesting that the relevant reference pool should be much larger. Those statistics demonstrate that (1) 27.1% of the graduating high school seniors in Maryland were African-American, (2) 22% of the students taking the S.A.T. in Maryland were African-American, (3) 17.9% of the students who graduated with a course curriculum meeting the University's general requirements were African-American, (4) 18.1% of all Maryland S.A.T. takers who scored over 380 on the math S.A.T. were African-American and (5) 19% of all Maryland S.A.T.-takers who scored above 270 on the

verbal S.A.T. were African-American.[53] In contrast,

---

[53] The 1991 statistics are the only ones in the record showing the percentage of Maryland high school graduates who were African-American, the percentage of S.A.T.-takers who were African-American, and the percentage of African-American high school graduates who met UMCP minimum course requirements. The percentage of African-Americans with minimum S.A.T. math scores are as follows: 1992 (14.6%); 1991 (18.1%); 1990 (16.3%); 1989 (16.1%); 1988 (15.5%). The percentage of African-Americans with minimum S.A.T. verbal scores are as follows: 1992 (18.5%); 1991 (19%); 1990 (17.3%); 1989 (16.8%); 1988 (16.5%). The percentage of Maryland's high school graduates graduating with a G.P.A. greater than 2.0 are as follows: 1992 (21.1%); 1991 (21.51%); 1990 (19.6%); 1989 (19.14%); 1988 (18.75%). See Def. Exs. 21-27.

Using these various applicant pools, defendant-intervenors employ standard deviation analysis to determine if the disparity between the pools and the percentage of black students entering UMCP in any particular year is simply the product of random chance or the product of racial discrimination. In other contexts, the Supreme Court has found that standard deviations that are "greater than two or three" give rise to an inference that the disparities are caused by racial discrimination. Hazelwood School Dist. v. United States, 433 U.S. 299, 307 (1977); Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977).

Here, the standard deviation analysis conducted by defendant-intervenors on UMCP's incoming freshmen for the last five years, reveals gross disparities when the percentage of African-American freshmen at UMCP is compared to the pool of black high school graduates, black high school graduates who took the S.A.T., black high school graduates completing the minimum course requirements, and black high school graduates with a G.P.A. of 2.0 or higher. Def-Int. Reply at 23. See also, Def-Int. Ex. 37. These disparities range from 3.4 (the deviation between the percentage of black high school graduates with a G.P.A. of 2.0 or higher and the percentage enrolled at UMCP in 1989) all the way up to 17.3 (the deviation between the percentage of black high school

13% of the incoming freshmen at UMCP in 1991 were African-American.[54] Def. Int. Ex. 37.

---

graduates who took the S.A.T. and the percentage enrolled at UMCP in 1992). Id. All the deviations are above the "two or three" considered by the Supreme Court to be "gross". Indeed, even using the narrower pools that plaintiff suggests, defendant-intervenors' analysis reveals gross disparities for certain years. Using the pool of black high school graduates with verbal S.A.T. scores above 270 yields gross disparities in 1988 (4.4), 1990 (3.8), 1991 (6.4) and 1992 (9.3). Def-Int. Ex. 37. Using the pool of black students with math S.A.T. scores above 380 yields gross disparities in 1988 (3.1), 1991 (5.4), and 1992 (5.0). Id.

[54] Plaintiff also argues that defendants' claims of underrepresentation fail to take into account the fact that 25% of UMCP's freshman class comes from out of state and thus from an applicant pool with a smaller percentage of African-Americans. This argument is erroneous for several reasons, ranging from the specific to the general. First, in making their standard deviation calculations, defendant-intervenors compare only African-American freshmen of in-state origin to the in-state applicant pool. Def-Int. Exs. 25, 26, 27, 37. Out-of-state black freshmen and the out-of-state applicant pool are completely factored out of the equation. Thus, they do not inflate the degree of underrepresentation. Second, plaintiff's use of the percentage of African-Americans enrolled in the first year of college throughout the country as a proxy for the out-of-state applicant pool is tautological. It assumes that the pool of applicants is the same size as the number who eventually matriculate. Thus it assumes that there is no discrimination. Third, plaintiff's use of a national figure also disguises the fact that UMCP takes a majority of its out-of-state students from five jurisdictions. In 1985, 59% of out-of-state students at UMCP come from the District of Columbia (6%), New Jersey (15%), New York (17%), Pennsylvania (11%), and Virginia (10%). Def-Int. Ex. 38. With the exception of Pennsylvania, each of these states, as well as the District of Columbia, have black populations that exceed the

There is a danger (created in part by the images of microscope and magnifying glass which the term "strict scrutiny" brings to mind) that a judge will become myopic when confronted with statistics such as these and assume that a single reference pool must be selected. In fact, such a narrowing of perspective is neither necessary nor proper.[55] Rather, the judge should look at the statistics as a whole to determine if they provide strong evidence of the existence of present effects of past

---

national average. Pl. Ex. 60, table 8. Since he has not taken these region variations into account, plaintiff has not met his burden of presenting material evidence to substantiate his claim that there is no underrepresentation at UMCP. Finally, plaintiff's argument fails to recognize that although the Banneker Program's remedial purposes are served by attracting African-Americans to UMCP from outside of Maryland, see infra note 74, it is entirely reasonable for the University to set enrollment goals in relation to its responsibility to educate the citizens of Maryland.

[55] I am aware that other courts which have considered the constitutionality of affirmative action plans have selected a single pool of qualified applicants in order to determine if historically there has been underrepresentation in a given class. See, e.g. Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, __ F.3d __ (3d Cir. 1993); Stuart v. Roach, 951 F.2d 446 (1st Cir. 1991); Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir. 1991); Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir. 1991). However, these cases have all arisen in the employment context. Not only do I consider them as generally being of only marginal precedential value in education cases, see infra section VI.A., I also find them to be particularly distinguishable when selecting an applicant pool since the college admissions process involves so many variables. In the education context use of a sliding scale reflecting at least some of those variables is more reasonable and appropriate.

discrimination.

Here, minimum admission requirements, even though subject to waiver in particular cases, cannot be entirely disregarded. If UMCP did not consider the qualifications of applicants, it would inflate its admission rates but doom its attempts to increase its retention and graduate rates to failure. On the other hand, the admissions process contains too many variables to define the reference pool by inflexible objective criteria which, in fact, are not mechanically applied by the University. Moreover, use of a pool defined exclusively by a high school G.P.A. and S.A.T. results would itself disguise the fact that the substandard, segregated education of many parents of the current generation of African-American students directly impacts the G.P.A.s and S.A.T. scores of UMCP's current black applicants.[56] Education is a continuous and expanding process in which knowledge, skills and attitudes towards learning are communicated from one generation to another. Unfortunately, we still live in a time when many African-Americans of college age are disadvantaged in this respect because their forbears received an inferior education under Maryland's segregated school system, of which UMCP stood at the top.

Considering the evidence as a whole, I have no difficulty in finding a strong evidentiary basis for UMCp's finding that African-American students are underrepresented at College Park. The 27.1% figure relating to all graduating high school seniors would not be an appropriate benchmark because it does not take into account even flexible minimum admission requirements. On the other hand, the unknown figure advocated by

---

[56] Def-Int. Ex. 29 at 2.

plaintiff based upon strict numerical scores is likewise an improper measure since it ignores the variables in the admissions process and the intergeneral effects of segregated education on the applicant pool. Using the 1991-92 school year as the prototype, the remaining scale of percentages ranges from 17.9% (percentage of African-Americans meeting general course curriculum requirements) to 22% (the percentage of African-Americans taking the S.A.T.). All of these compare unfavorably to the percentage (13%) of incoming freshmen at UMCP who were African-American that year.[57] Moreover, it is improper to analyze the statistics for any single year -- the dimension of time must be considered. Thus, it cannot be forgotten that although UMCP in recent years has made substantial efforts to increase the number and percentage of African-Americans whom it enrolls as freshmen, it was not until 1983 that the percentage reached 10% and not until 1989 that it reached 15.8%. It has fluctuated since that time.[58]

2. Comparison with northern institutions

Plaintiff further argues that since the percentage of black undergraduates at UMCP is comparable to the

---

[57] Additionally, when a standard deviation analysis is conducted on these pools as compared to the percentage of incoming African-Americans, the deviations are "gross." Def--Int. Ex. 37. See supra note 53.

[58] The percentage of first-time full-time freshmen at UMCP who are African-American in each year since 1974 (when the statistic was first kept) is as follows: 1974 - 6.6%; 1975 9.4%; 1976 - 8.8%; 1977 -9.0%; 1978 - 7.9%; 1979 - 7.4%; 1980 8.9%; 1981 - 8.6%; 1982 - 9.6%; 1983 - 10%; 1984 - 9.6%; 1985 - 10.5%; 1986 - 12.1%; 1987 - 12.5%; 1988 -13.6%; 1989 - 15.8%; 1990 - 15.0%; 1991 - 13.0%; 1992 - 11.3%; 1993 - 15.3%.

percentage at public universities in states that "have not had segregated higher education systems", it is impossible to prove that the underrepresentation at UMCP is related to its past discriminatory acts as opposed to some present societal condition that affects both northern and southern universities.

Plaintiff's argument is flawed for several reasons. First, universities are not fungible. Each has its own institutional history, and plaintiff has presented no evidence concerning the histories of the universities he alleges to be comparable. Second, most of the states whose universities plaintiff alleges are comparable to UMCp have smaller black populations than does Maryland. Thus, the fact that Maryland's percentage of enrollment exceeds theirs is of little import.

Most importantly, plaintiff's assertion that northern universities do not have a history of segregation is unproven and wrong. While northern states did not have de jure segregation, the admissions policies of nearly every northern college and university excluded African-Americans from college campuses almost as effectively as the legal requirements of segregation in southern states. Between 1826 and 1910, only 693 blacks were graduated from predominantly white colleges.[59] This minuscule number was not due to a lack of qualified candidates. By 1930, predominantly black colleges were graduating approximately 19,000 students a year. Even the City College of New York, which had no admissions requirements and an institutional mission to serve the

---

[59] Blassingame, Comment, in The Rockefeller Foundation Working Papers on Bakke, Weber and Affirmative Action at 208 (1979). Ballard, The Education of Black Folk at 52 (1973).

poor, had only two black graduates by 1910.[60] In fact, the vast majority of predominantly white colleges did not begin admitting African-Americans until after World War II.[61] Even after the Second World War, northern colleges admitted only a tiny quota of black students each year. By 1954, African-Americans made up only 1% of freshmen at predominantly white institutions.[62] This percentage did not increase above 2% until the late 1960s.[63]

Not surprisingly, the tiny portion of black college-goers who matriculated at predominantly white institutions before the late 1960s found themselves in profoundly inhospitable environments, even at the most "progressive" liberal arts colleges. Forced to live in segregated housing, excluded from white social events and institutions, and often banned from participating in intercollegiate athletics, African-Americans at northern universities led lonely, secluded lives.[64] As George

---

[60] Flemming, "Black Students in Higher Education to 1954" in Thomas ed., Black Students in Higher Education (1980). Ballard, supra note 59, at 52.

[61] Alexis, "The Effect of Admissions Procedures on Minority Enrollment in Graduate and Professional Schools," in Rockefeller Foundation Working Papers at 53.

[62] Blassingame, supra note 59, at 209. Ballard, supra note 59, at 52.

[63] Mingle "The Opening of White Colleges and Universities to Black Students," in Thomas at 24. Ballard, supra note 59 at 60-80.

[64] Mingle, supra note 63, at 22. Ballard, supra note 59, at 54-56.

Davis, an African-American writer and educator, wrote about the life of a black student at a small liberal arts college: "[F]or four years he had felt distant and detached in this fragile, alien environment. . . . [T]he white students looked the same as the ones he had known. . . . They were still the same healthy, unmenaced children of the rich that made his life so lonely for four years."[65]

Considering this extensive record of de facto discrimination on northern college campuses, plaintiff's comparison of UMCP to its peer institutions in the north fails to prove that the University has no present effects of past discrimination. Both northern and southern institutions of higher education have practiced discrimination against African-Americans. Thus, the argument that, as far as racial issues are concerned, UMCP is more like a northern university than a southern one, even if assumed to be true, does not eliminate the possibility that racial problems at College Park are the present effects of past discrimination. To the contrary, there is no reason to assume that, considering their history of discrimination, northern universities are not themselves now experiencing the present effects of past discrimination.

C.

The third present effect of past discrimination that

---

[65] Quoted in Ballard, supra note 59, at 54. Preeminent civil rights lawyer Charles Hamilton Houston had similar feelings of loneliness and alienation at Amherst College during the midnineteen teens and at Harvard Law School during the 1920s. McNeil, Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights at 31-32, 51-52 (1983).

UMCP has found is that African-Americans have a disproportionately high attrition rate. I hold that there is a strong evidentiary basis for this finding. The attrition rate for African-American students at UMCP is substantially higher than it is for students who are not African-Americans. For example, for freshmen entering UMCP in 1989, only 62.4% of the black freshmen remained at College park after three years in comparison to 74.5% of the white freshmen and 73.4% of the total 1989 freshmen population. Even larger disparities exist with respect to the relative graduation rates of African-Americans and other groups. For freshmen entering UMCP in 1986, only 42.5% of the black freshmen graduated after six years in comparison to 63.5% of the white freshmen and 63.5% of the total 1986 freshmen population. No other identifiable group at the University has such low retention and graduation rates. Def. Exs. 35-41.

Plaintiff does not challenge the accuracy of these statistics. Rather, he argues (as he does elsewhere) that since the retention and graduation rates at UMCP are comparable to those at northern universities that have no history of de jure segregation, they cannot be said to be an effect of the University's past discrimination. This argument fails for the same reason as it does in other contexts: it is based upon the erroneous assumption that there was no de facto segregation at northern universities. See supra section IV.B.2. Plaintiff also suggests that low African-American retention and graduation rates can be explained by the fact that, because of an admissions preference given to African-American's in UMCP's admissions process, blacks who get into the University are generally less qualified than whites. However, the record establishes that even controlling for S.A.T. scores,

African-American retention and graduation rates are lower than white retention rates; given a group of people with the same S.A.T. scores, a higher percentage of blacks drop out than whites. Def. Ex. 114, table 12.

Left unexplained by plaintiff, the low retention and graduation rates among African-American students stand as perhaps one of the strongest testaments to the continuing racial problems which UMCP faces. If no effects of past discrimination remained, one would expect the relative retention and graduation rates of blacks and non-blacks to approximate one another. Undoubtedly, one of the factors that contributes to the high attrition rate among African-American students is that many of them are less wealthy than their white counterparts and cannot continue their education at the University because of financial hardship. Plaintiff would argue that, despite the adverse impact of educational deprivation upon employment opportunities, this is of no moment because economic disparity among the races is an effect of "societal discrimination" which UMCP is not permitted to remedy by a race-based scholarship program. See Croson, 488 U.S. at 498-500; Wygant 476 U.S. at 274-76. Even assuming this to be true, it is not only financial hardship that leads students to leave college before graduation. In given cases an absence of commitment to the school because of its poor reputation in the community from which a student comes, the lack of shared experience with family members to help the student through the arduous process of higher education, the absence of African-American members of the faculty

to serve as mentors[66] and the existence of a hostile racial atmosphere on campus are other significant contributing factors. Def. Ex. 114. These conditions are all directly attributable to Maryland's history of segregated education of which UMCP was an integral part.

D.

The fourth present effect of past discrimination which UMCP has found to exist is a prevailing perception that the climate on the college Park campus is hostile to African Americans. Again, there is a strong evidentiary basis in the record to support this finding.

A study commissioned by the University in 1989 (before plaintiff filed this suit) concluded that there is a "chilly climate for Blacks at UMCP" manifested by complaints of racism made to the University's Office of Human Relations, by overtly racist comments by faculty and teaching assistants, by the lack of African-American leaders on campus, and by the failure of campus media entities to cover the accomplishments of black faculty, staff, and students. Def. Ex. 17 at 10-16. Responding to this report, the University commissioned an in-depth study of race relations on campus. An overwhelming majority of black students (86%) surveyed said that race relations between students were a problem at UMCP and 89% of these students said it was a very serious or somewhat serious problem. A smaller majority of white students (56%) said that race relations were a problem on campus. Def. Ex. 34 at 111. Other findings indicated

---

[66] In 1989, the most recent year for which there are statistics in the record, African-Americans made up 3.8% of UMCP's faculty. Def-Int. Ex. 21, table 24.

that there was a perception that anti-black behavior was frequently exhibited on campus:

- 82% of black respondents (including both faculty and students) and 68% of white respondents reported observing "racial role stereotyping of black students by students often or sometimes."

- 50% of black students and 29% of white respondents reported that they have observed hostility by students towards black students often or sometimes.

- 34% of black students and 20% of white students reported observing often or sometimes exclusion of black students from social events "because of race."

Id.

The student focus groups conducted by Dr. Feagin yielded similar results. Eighty-nine percent of the students Feagin interviewed "disagreed" or "tended to disagree" with the statement: "the University of Maryland at College Park is a college campus where black students are generally welcomed and nurtured." Feagin Report II, at 10. Comments by students in these focus groups evidenced the existence of condescending attitudes and mistreatment by faculty members,[67] and casual use of

---

[67] "A lot of my teachers and students handle me with kid gloves. . . . I'm like 'Give me the truth the way it is an I'll deal with it and give it back to you.' But that's what I don't like. I can tell when they're being patronizing and that

racial epithets by students.[68] Another student reported simply feeling invisible on campus:

> So I got my yearbook . . . [a]nd I'm going through it and I'm not seeing very many black people and the one -- they had a picture of like I think blacks in pre-med. That was the only black scholastic organization that they had. They had two pages for the homecoming step show, that was about it. They did their traditional dorm life, students moving in, all this for white students like I guess black students didn't move in. They, like, landed on the roof and snuck in, into the dorms. . . . But yet it's part of the yearbook. You know, glorifying their life and their recreational activities, and where black students aren't even represented in the yearbook.

Id. at 18.

---

happens a lot so I just deal with it." Def. Ex. 13 at 14. Other students reported not getting into classes or having their questions dismissed because they were black. Id. at 18, 25.

[68] "[M]y best friend was a white guy, and he's in the Greek system and that's like what I think is a racist thing about campus. And I went to a party the other day , and one of his brothers got mad I was there. Well he just said "I just got rid of some little black [epithet]." Def. Ex. 13 at 15. "[O]nce 1 was down on Route 1 . . . and somebody yelled 'nigger' out of the car. And I was like "oh, what am I supposed to do?" Id. at 16. "Last year, while walking to the campus dining hall with a group of fellow African-American female classmates, a group of white males came up behind us and made several lewd sexual comments to us, specifically focused on the fact that we were black women." Def. Ex. 48, ¶ 11.

A segregated atmosphere continues to permeate UMCP's campus. Students segregate in the dining halls and classrooms, and African-American students feel that they are not welcome at fraternity parties, bars, and the student newspaper. Detrick, Still Suffering from Racism, UMCP Diamondback, April 26, 1989 at 1. Def. Ex. 13 at 23. Def. Ex. 7 at 23. Def. Ex. 90, ¶ 3. Def. Ex. 13 at 11. Separate homecomings exist for whites and blacks. Def-Int. Mem. at 44. Academic segregation also exists, with very few black students getting degrees in the sciences and other technical fields. Def. Ex. 43, table 16 (showing that African-American comprise only 1% of the degrees awarded in mathematics, architecture, and the physical sciences).

In the face of this evidence of an adverse racial climate at UMCP, the main dispute between the parties is as to whether this climate is the result of the University's past discriminatory acts. Several of the experts who testified before the University's administrative hearing linked UMCP's adverse racial climate to its history of de jure and de facto segregation. Def. Ex. 18 at 28. Def. Ex. 13 at 2-3. Def. Ex. 14 at 12, 25. Even more convincing evidence of the historical origin of UMCP's adverse racial climate is provided by the stream of racial incidents that have continuously marred the University since de facto segregation ended in the early 1970s. Professor William Sedlacek examined UMCP's school newspaper from 1970 to 1991 and kept count of articles, commentary and letters to the editor that had "negative implications" for African-American students. These included reporting on racist incidents, racist letters to the editor and articles, commentary and letters highlighting black academic failure, preferential treatment, and social

isolation.[69] Def. Ex. 15 at 38-40.

The quantity and regularity of these articles and the fact that they have continued unabated since UMCp began desegregating strongly suggests that the University's adverse racial climate is a legacy of its past discriminatory practices. Cf. United States v. Fordice, 112 S.Ct. 2727, 2736 n.4 (1992) (holding that continuing racial identifiability is probative as to whether a state has dismantled its segregated system of higher education). Universities necessarily have cultures that span several entering classes, and generations of college students cannot be separated from one another. The very nature of the college experience is that younger students learn from older ones. Accordingly, the causes of a hostile racial climate cannot be divided into discrete cabined units, as plaintiff seeks to do. Since 1970, both black and white students have been handing down racial attitudes

---

[69] Plaintiff considers theses articles to be evidence of a "robust discussion of race." Pl. Reply at 47. This comment indicates that plaintiff misses the point of Professor Sedlacek's thesis. Sedlacek is not saying that the discussion of racial issues on campus is bad from an intellectual perspective. He is instead arguing that when these issues are discussed, AfricanAmericans are consistently portrayed in a negative light. Additionally, the fact that these issues continually appear in the campus newspaper -- be that a good thing or not -- has a negative impact on black students' attitude about the racial climate at UMCP because they foster the impression that race is the most significant thing about an African-American student's persona at the University. In any event, Sedlacek's study indicates a depressing number of items appearing in the newspaper that are not "a robust discussion of race" but are instead manifestations of outright racism at UMCP, including letters from the Ku Klux Klan and reports of racial epithets being shouted at anti-apartheid protesters. Def. Ex. 15 at 23-33.

that perpetuate a hostile racial climate.

Even if the continuous stream of racial incidents is not enough to link UMCP's present racial climate with past discrimination, a close examination of the sources of racial tension on campus reveal that they are intimately related to UMCp's past discrimination. Many of the disputes between white and African-American students since the end of de facto segregation have been over UMCP's attempts to integrate or its failure to do so. As the University has attempted to equalize the funding between black student organizations and white student organizations, white students have lashed out at black students.[70] When the University has taken actions that the African-American community at College Park perceives as scaling back desegregation, African-Americans have lashed out at the University.[71] If the University had not been segregated, if it had always

---

[70] See, e.g., Def. Ex. 70 at 165, 166, 168-70. Crowley, What About Poor Whites? UMCP Diamondback, March 3, 1980 at 4. Patterson, Delegates Lodge Protest of BSU-Sponsored Event, UMCP Diamondback, February 8, 1982 at 1. Lift the Veil. UMCP Diamondback, February 23, 1983 at 4. Lake, Hard Work Makes You Free, UMCP Diamondback, April 12, 1988 at 4. Bennett, Needy Minority Students Benefit from Banneker Scholarships, UMCP Diamondback, June 20, 1991 at 1.

[71] See, e.g., Def. Ex. 70 at 211-14, 219-22, 228-30. Green, What About Blacks? UMCP Diamondback, September 6, 1973 at 4. Malloy, Legislators Hear Blacks' Gripes, UMCP Diamondback, March 7, 1977 at 1. Thomas, Blacks Decry Gonzalez Remarks, UMCP Diamondback, January 23, 1979 at 1. Humphreys, Black Group Hits Graduate Dean Search, UMCP Diamondback, April 23, 1980 at 1. Gonzales, BSU Protests Hiring Policies, UMCP Diamondback, March 4, 1982 at 1.

supported black and white fraternities and sororities equally, and if it had funded the cultural activities of all groups on campus equally, then there

would be no need for the present day actions that the University must take to rectify these problems which are contributing to racial tension.[72]

V.

In my earlier opinion I found that the Banneker Program is "narrowly tailored" to remedy the effects of past discrimination that continue to exist at UMCP. In its opinion the Fourth Circuit did not reach that issue. However, it questioned in passing the scope of the Program, indicating that while "the program may be valuable as a recruitment tool, . . . the value of the much-expanded program, as opposed to the program in its more limited form or other non-race-based remedies, is not clear." Podberesky v. Kirwan, 956 F.2d at 57 n.7.

In United States v. Paradise, 480 U.S. 149 (1987), the Supreme Court established a framework for addressing the "narrowly tailored" question. It identified four criteria by which to judge the nexus between a remedial plan and the interest it purports to serve: "the necessity for relief and the efficacy of alternative?

---

[72] Here, plaintiff also makes his usual comparative argument: that since the racial climate at certain northern universities is hostile, defendant cannot prove that UMCP's adverse racial climate is related to its past segregation. For the reasons I previously stated, I consider this argument to be without merit. See supra section IV.B.2.

remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." 480 U.S. at 171. I will briefly consider each of these factors.

1. The Necessity For Relief And The Efficacy Of Alternative Remedies

UMCP's finding that the consequences of its segregative past continues to be felt ipso facto establishes the necessity for relief. However difficult other issues in this case may be, no one would contend that a public university may simply ignore present effects of past discrimination for which there is a strong evidentiary basis. Similarly, it cannot be seriously contended that the Banneker Program is not extremely effective in remedying the problems which UMCP has found to exist. By attracting high-achieving black students to the UMCP campus, the Program directly increases the number of African-Americans who are admitted and likely to stay through graduation. Even more importantly, the Program helps to build a base of strong, supportive alumni, combat racial stereotypes and provide mentors and role models for other African-American students.[73] Continuation of

[73] In Wygant, the Court held that a "role model theory" was an impermissible basis for an affirmative action program. 476 U.S. at 276. However, the program that the Court struck down in Wygant used role models in an attempt to alleviate what the Court considered to be societal discrimination. Id. at 274. In this instance, the role model function of the Banneker scholars is directly related to eliminating specific present effects of past segregation. Role models are being used as a tool to combat the present effects of UMCP's past

the Program thus serves to enhance UMCP's reputation in the African-American community, increase the number of African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus.

UMCP has considered the two alternatives which plaintiff espouses and has concluded that they would not be nearly as effective as the Banneker Program in remedying the problems that continue to exist. The first of these alternatives - a raceblind merit-based scholarship program based upon conventional criteria such as high school G.P.A. and S.A.T. scores - would not result in a sufficient number of African-American students receiving scholarships to have the necessary curative effects. This fact is established conclusively by UMCP's experience with the Key Scholarship Program which is race-neutral and merit-based. In 1992, out of thirty-six Key Scholarships awarded, African-Americans received two, Asian Americans received ten, Hispanics received one and whites received twenty-three. In 1991 twenty-seven Key Scholarships were awarded: two to African-Americans, five to Asian-Americans, one to Hispanics and the remainder to whites. In 1990 fifty-two Key Scholarships were awarded; African-Americans received two, Asian-Americans received seven, Hispanics received two and whites received twenty-three. In 1989, forty-seven scholarships were awarded: one to an African-American, three to Asian-Americans, two to Hispanics and forty-one to whites. Def. Ex. 61.

---

illegal acts.

The second possible alternative - expansion of need-based scholarships on a race-neutral basis - would likewise be ineffective in achieving the purposes for which the Banneker Program is designed. UMCP does not shy away from the fact that the Banneker Program is a recruiting tool. As analyzed by the University, its success in curing the vestiges of its past discrimination depends upon it attracting high-achieving African-Americans to the College Park campus.[74] Because such students often come from middle-class families and would not qualify for financial assistance, an increase in racially-neutral financial aid packages would lack the same remedial effect. Indeed, UMCP's experience with the Frederick Douglass Scholarship Program which provides need-based awards solely for African-Americans - demonstrates that African-Americans meeting the Banneker qualifications are not drawn to College Park by such a need based program. Def. Ex. 1A at 49-50.

2. The Flexibility And Duration Of The Relief

The Banneker Program is not "flexible" to the extent that it is limited to African-Americans. This characteristic is by definition common to all affirmative action programs. Indeed, if a program were to benefit

---

[74] Plaintiff suggests that the Banneker Program is not "narrowly tailored" because it awards scholarships to African-Americans from outside of Maryland. Although it obviously would be preferable to award Banneker Scholarships to Maryland AfricanAmericans who meet the necessary requirements, the Program's purposes of increasing the number of African-American role models and mentors on the campus, of breaking down cultural barriers and combating racial stereotypes are served regardless of whether Banneker scholars are Maryland native or not.

persons of a class that was not a victim of past discrimination, it would be unconstitutionally overbroad. In any event, even if the Banneker Program's racial exclusivity were to count against it under the Paradise criteria, it gives it the virtue of candor. It is far better to confront an issue forthrightly than disguise it by dishonest compromise. Here, providing scholarships to students who are not African-American would not serve the purpose of the Banneker Program, and formally opening the Program to all while limiting it in practice to a few would be a mere legal contrivance. It is by such stratagems that institutional integrity is undermined.[75]

As to the question of duration, in its Decision and Report UMCP stated that "while it assumes that remedying past discrimination and achieving a racially diverse campus community will remain one of its objectives for the foreseeable future, it does not assume that the Banneker Program must be a perennial feature." Decision and Report at 53. UMCP is required to review the Program periodically, at least once every three academic years, for the purpose of determining whether the conditions which it is intended to redress persist and whether it is being effective in attaining its goals. To ask more of the University would be unreasonable. It does not possess a crystal ball that would enable it to predict

---

[75] Plaintiff makes much of the fact that in its original form the Banneker Program was open to all minorities. The record establishes, however, this aspect of the original program stemmed from legal advice that the Banneker Program could not be sustained if it were restricted to African-Americans. However sound at the time it was given, this advice has now been overridden by subsequent case law that permits race-conscious remedies where past discrimination warrants.

the precise year in which it will overcome its segregative past. Attitudes cannot be changed overnight, and the temporal scope of an effective remedy cannot be arbitrarily defined. Rather, a curative program must be evaluated over time in the context of the institution's changing environment. The regular review process which UMCP has imposed upon itself will assure that such evaluation will occur.

3. The Propriety Of The Program's Numerical Goals

In measuring the propriety of the Banneker Program's numerical goals, this court is supposed to compare the number of Banneker Scholarships to the "relevant labor market." Paradise, 480 U.S. at 171. Since the number of scholarships given is small, the Banneker Program satisfies this inquiry. If the relevant labor market is incoming freshmen -- who number approximately 3100 -- and the number of scholarships given is in the high twenties, then less than 1% of the "labor market" receives a scholarship. Def. Ex. 72. Def. Ex. 7 at 145-58. This percentage is small compared to any of the possible goals that the parties have bandied about, be it the 27.1% figure (percent of black high school graduates), 17.9% figure (black high school students who have met the core curriculum requirements) or even 14.6% (black students scoring above 370 on the math S.A.T.).

4. Impact Of The Program On The Rights Of Third Parties

Perhaps the greatest strength of the Banneker

Program is that it is designed to remedy the effects of past injustices to African-Americans without interfering with the rights of others in the process. Banneker scholarships are awarded only after admission decisions are made, and they thus have no effect upon whether a student who is not African-American is able to attend UMCP. Further, the Program consumes only 1% of the total financial aid budget at the University. Thus, while I ruled in Podberesky I that plaintiff has suffered a legally cognizable harm sufficient to confer standing upon him, neither he nor any other non-Banneker student has suffered any appreciable monetary loss from the award of Banneker scholarships.[76] At bottom, the only damage to

---

[76] UMCP's Director of Admissions has stated by affidavit that if the Banneker Program were discontinued, the funds which it utilizes would not be placed into general scholarship funds but would be channeled into other desegregation programs. Def. Ex. 9, ¶ 34. In that event, destruction of the Program would provide no monetary benefit at all to plaintiff or others similarly situated to him. In any event, the Supreme Court has recognized that in affirmative action programs "innocent persons may be called upon to bear some of the burden of the remedy," and that as long as these burdens are not "undue" or "unacceptable" the program will pass constitutional muster. Wygant, 476 U.S. at 280-81; Metro Broadcasting v. F.C.C., 110 S.Ct. 2997, 3026-27 (1990), Paradise, 480 U.S. at 182. The minimal burden imposed on nonminorities by the Banneker Scholarships meets this standard. Amounting to less than 1% of UMCP's financial aid budget, the removal of the Banneker Scholarship funds from the general pool of financial aid awards has a negligible impact on third parties applying for aid. Def. Ex. IA at 52-53. Def. Ex. 59, ¶ 26. See, e.g., Metro Broadcasting, 110 S.Ct. at 3026-27 ("we disagree that the distress sale policy imposes an undue burden on nonminorities. By its terms, the policy may be involved at the Commission's discretion only with respect to a small fraction of broadcast licenses. . . ." (emphasis added); Fullilove v.

plaintiff is the insult to his sensibilities caused by the continuation of a program which he believes to be wrong in principle. However sincere his views in that regard may be, the harm which he suffers is far outweighed by the needs and goals the University has articulated.[77]

VI.

Having found that there is a strong evidentiary basis for finding that present effects of past discrimination exist at UMCP, I have completed the task which the Fourth Circuit has asked of me on remand. During the course of writing this opinion, however, I have reached the conclusion that in our earlier opinions both I and the Fourth Circuit may have constructed too rigid a framework of analysis. Because I have come to believe

---

Klutznick, 448 U.S. 448, 484 (1980) (holding that the burden on nonminorities caused by a 10% minority set aside program was "relatively light"). Thus, even if plaintiff and others like him did suffer a slight financial injury, this would not render the Banneker Program unconstitutional.

[77] I do not intend to demean plaintiff's concerns. An instinct for equal treatment lies at the heart of the idea of justice. Indeed, many Americans or their forebears came to this country for the very purpose of escaping systems of group preference and privilege which deprived them of individual opportunity. I also do not suggest that affirmative action programs, however moderate, are a panacea for remedying past ills. The concept that history is progressive by nature is an illusion, and over time affirmative action programs may prove to be counterproductive. This will be particularly true if they reenforce the stereotype that African-Americans succeed only because of special favor and generate sustained resentment among those not benefitted by them. UMCP, has, however, itself recognized this potentiality, Decision and Report, at 45, and no doubt will be cognizant of it as it conducts it periodic review of the Banneker Program.

that (1) precedents involving employment disputes provide imperfect analogies for determining the constitutionality of an affirmative action program in the education context, and (2) focusing solely upon past discrimination in education cases blurs vision and obstructs understanding, I feel compelled to add a few words.

The standard that the Fourth Circuit and I have heretofore used in this case -- that there must exist a strong basis in evidence of present effects of past discrimination -- finds its genesis in the context of employment discrimination. See, e.g., Croson, 488 U.S. 467; Wygant, 476 U.S. 267.[78] Reflexive use of the same standard in the education context fails to acknowledge that the Supreme Court has consistently recognized that discrimination in schooling is the most odious form of discrimination.

In Brown v. Board of Education the court held that: "[e]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education in our democratic society." 347 U.S. 483, 493 (1954). Because of the paramount importance of public education in our society, the Court has created aggressive affirmative duties in the area of primary and secondary school desegregation (Keyes v. School District No. 1, 413 U.S. 189 (1973); Green v. New Kent County School Board, 391 U.S. 430 (1968)) and a presumption that the

---

[78] Indeed, with the exception of Regents of the University of California v. Bakke, 438 U.S. 265 (1978), all the extant jurisprudence on affirmative action was created in employment discrimination cases.

effects of the segregation continue until a court finds otherwise. Board of Education of Oklahoma City v. Dowell, 111 S.Ct. 630 (1991). The primary importance of education also explains why the Supreme Court and various lower courts are willing to consider remedies that encompass a state's entire system of higher education as opposed to a single school. United States v. Fordice, 112 S.Ct. 2727. United States v. Louisiana, 815 F. Supp. 947 (E.D. La. 1993). Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991).

Thus, the various restrictions that the Court has applied to affirmative action programs in the employment context -- particularly the prohibitions against remedying the effects of "societal discrimination", or discrimination that was done by another "governmental unit" -- appear inappropriate in the education context where the effects of past discrimination are obviously societal in scope.[79] Indeed, the Court emphasized the broad social effects of education in Brown:

> [Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument for awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust

---

[79] Even if it was held that the "governmental unit" restriction is applicable in the education context, it would be nonsensical to hold that institutions of higher education may not attempt to remedy past discrimination by primary or secondary schools. Systems of public education are just that -- "systems." The schools within them are inextricably linked to one another.

> normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he has been denied the opportunity of an education.

347 U.S. at 493. A fire department's discriminatory hiring practices have little or no effect on the society at large. But discrimination in the nation's educational institutions has created a ripple effect that necessarily affects every aspect of our economy and society. Accordingly, it seems entirely proper that in order to cure these effects, legislatures and educational administrators be given more leeway in fashioning remedies that take into account the vast extent of the damage that has been done by our shameful legacy of involuntary segregated education.

B.

Even if we ignore that legacy, in light of the vital role which public education plays in forming and transmitting values, why in a case such as this should the only relevant question be whether presently existing racial problems are traceable to specific acts of discrimination which have occurred in the past? Undoubtedly, our history contributes mightily to our prejudices, and it is at best naive and at worst disingenuous to suggest that a culture of bigotry inculcated over centuries can be erased by less than twenty years of ameliorative measures. But let us assume for the purpose of argument that each generation is, in fact, born cloaked in innocence and pure of soul. If effects of racism nevertheless appear on our university campuses, would it not be a paradox, the height of irony, that our educational institutions could not attempt to cure them because it is we, not our parents or

grandparents, who are their source?

This is not to say that public colleges and universities should be given carte blanche to establish unrestricted affirmative action programs whenever university officials posit that a racial problem has arisen. Although slavery and Jim Crow laws make our heritage hypocritical, we are bound together by the ideal of equality - an ideal which race-conscious remedies tend to contradict. Therefore, any such remedies must be subjected to "strict scrutiny" by the courts.

Strict scrutiny is, however, a process, not a mere quantum of proof or other mechanical test. In the education context, it should, in my view, involve asking the following questions: (1) Does a nucleus of fact exist which can reasonably be interpreted as evidencing the effects of racism; (2) Did the officials responsible for addressing the problem engage in an open and deliberative decision-making process; (3) Did they articulate the reasons for their conclusion that a problem requiring correction exists; (4) Did they adopt a narrowly tailored remedy that has minimal impact upon the rights and interests of persons not benefitted by the remedy; (5) Was the decision-making body controlled by members of a race benefitted by the remedy;[80] and (6) Has provision been made for regular periodic review to determine the continued necessity and efficacy of the chosen remedy.

In this case the responses to these questions all support upholding the constitutionality of the Banneker Program. Whatever their exact cause may be, the poor

---

[80] See Croson, 488 U.S. at 495-96.

reputation of UMCP among African-Americans, the low enrollment, retention and graduation rates for African-American students at College Park and continuing racial tensions on its campus all can reasonably be interpreted as constituting, at least in part, the effects of racism (present or past). In deciding to continue the Banneker Program, UMCP has engaged in a public process in which all sides were given an opportunity to be heard. The Decision and Report issued by UMCP fully articulates the basis for continuing the Program. The Program is narrowly tailored and has little (if any) impact upon the rights and interests of students who are not African-American. African-Americans do not control the decisionmaking process, and UMCP's Decision and Report provides that the Banneker Program is to be reviewed every three years for the purpose of determining whether it should be continued.

VII.

Few issues are more philosophically divisive than the question of affirmative action. It strikes at our very souls as individuals and as a nation. It lays bare the conflict between our ideals and our history. The answers that we give to it today cannot be cast in stone, but must stand exposed, in all of their fragility, to the tests of time and experience. All that we can ask of those entrusted with the responsibility of running our institutions, both public and private, is that they approach the issue intelligently, sensitively and self-critically, without bias, self-interest or cant. This, the University of Maryland at College Park has done in adopting and resolving to continue the Banneker Program, and its judgment

withstands the scrutiny to which the Constitution properly subjects it.

Date: November 18, 1993

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL J. PODBERESKY	*	
	*	Civil No.
v.	*	JFM-90-1685
	*	
WILLIAM E. KIRWAN,	*	
Presidentof the University	*	
of Maryland at College Park,	*	
and the University of	*	
Maryland at College Park	*	

****

For the reasons stated in the opinion entered herein, it is, this 18th day of November, 1993

ORDERED that

1. Plaintiff's motion for summary judgment is denied;

2. Defendants' motion for summary judgment is granted; and

3. Judgment is entered in favor of defendant against plaintiff.

J. Frederick Motz
United States District Judge

Daniel J. PODBERESKY,
Plaintiff-Appellant,

v.

William E. KIRWAN, President of the University of Maryland at College Park; University of Maryland, at College Park,
Defendants-Appellees,

State of Ohio; State of Idaho; State of Illinois; State of South Dakota; State of Vermont; State of Virginia; State of West Virginia; N.A.A.C.P. Legal Defense and Education Fund, Inc.,
Amici Curiae.

No. 91-2577

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 31, 1991.
Decided Jan. 31, 1992.

Richard Abbott Samp, Washington Legal Foundation, Washington D.C., argued (Daniel J. Popeo, Washington Legal Foundation, Washington, D.C., Samuel Podberesky, Randallstown, Md., on the brief), for plaintiff-appellant.

Andrew Howard Baida, Asst. Atty. Gen., Baltimore, Md., argued (J. Joseph Curran, Jr., Atty. Gen. of Md., Richard A. Weitzner, Gerald J. Gaeng, Asst. Attys. Gen., Baltimore, Md., on the brief), for defendants-appellees.

Janell M. Byrd, NAACP Legal Defense and Educational Fund, Inc., Washington, D.C., Julius LeVonne Chambers, Norman J. Chachkin, NAACP Legal Defense and Educational Fund, Inc., New York City, David M. Becker, Michael C. Small, Wilmer, Cutler & Pickering, Washington, D.C., for amicus curiae NAACP Legal Defense Fund.

Lee Fisher, Atty. Gen., of Ohio, Loren Braverman, Deputy Chief Counsel, Theresa Rittinger Schaefer, Asst. Atty. Gen., Columbus, Ohio, for amici curiae State of Ohio, et al.

Before WIDENER and HAMILTON, Circuit Judges, and RESTANI, Judge, United States Court of International Trade, sitting by designation.

OPINION

RESTANI, Judge:

Appellant, Daniel J. Podberesky, appeals from a grant of summary judgment entered on May 15, 1991. 764 F.Supp. 364. Appellees are the president of the University of Maryland at College Park ("UMCP") and UMCP itself, which maintains a race-based scholarship program from which appellant was excluded. Appellant sued for injunctive, declaratory and compensatory relief alleging violations of his rights under the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983 and 2000d *et seq.*

Background

Appellant is a nineteen year old Hispanic male who

was admitted to UMCP in the fall of 1989. As an applicant to UMCP, appellant had an excellent academic record: his Scholastic Aptitude Test score was 1340, out of a possible 1600; his grade point average as calculated by his high school was over 4.0 (as calculated by UMCP, his grade point average was 3.56); and he actively participated in several extracurricular activities.

Along with his application to UMCP, appellant requested that he be considered for an academic scholarship.[1] UMCP maintains several scholarship programs, one of which is the Benjamin Banneker Scholarship Program ("Banneker Program" or Banneker Scholarship"), a scholarship program not based on need, under which a minimum of twenty scholarships are awarded each year. UMCP established the Banneker Program in 1978; however, for the first decade of its existence it was limited in scope. Originally, the program provided twoyear scholarships with stipends of $1,000 per year. In approximately 1985, the program was expanded to four-year scholarships. In 1988, the amount of the

---

[1] It should be noted that the race-based classification at issue relates to a non-need-based scholarship program voluntarily established by appellee. Thus, this situation is distinguishable from *Ayers v. Allain*, 914 F.2d 676 (5th Cir.1990) (*en banc*), *cert. granted sub nom. United States v. Mabus*, __ U.S. __, 111 S.Ct. 1579, 113 L.Ed.2d 644 (1991), in which black citizens sought mandatory remedies for alleged vestiges of prior discrimination in various components of higher education in Mississippi including "student admissions standards and enrollment, university staff composition, institutional mission, provision and maintenance of facilities, allocation of financial resources, curricular offerings and placement of programs, operation of branch programs, allocation of land grant functions, and the composition of the Board of Trustees and its staff." *Id.* at 678.

scholarship was increased to full in-state tuition or out-of-state tuition, plus room, board and mandatory fees, worth in excess of $33,500 over the four years.

At the time appellant applied for the Banneker Scholarship, the minimum requirements for further consideration under the Banneker Program were a 900 Scholastic Achievement Test score and a 3.0 grade point average. Only students of African-American heritage are considered for the Banneker Scholarship.[2] Appellant's credentials exceeded those required for further consideration under the Banneker Program; nevertheless, appellant was not considered for this scholarship because he was not of African-American heritage.

The Banneker Program was intended as a partial remedy for past discriminatory action by the State of Maryland. For many years the State of Maryland maintained a system of higher education consisting of separate racially-segregated institutions.[3] After *Brown v.*

---

[2] Applicants not meeting this last criterion are still eligible to compete for the other merit-based, academic scholarship, the Francis Scott Key Scholars Program ("Key Program"). The Key Program provides benefits identical to those given under the Banneker Program to approximately 53 students. In order to be considered further under the Key Program, an applicant must have a "predictive index" of 60. This index is calculated by reference to the Scholastic Aptitude Test score and grade point average. Appellant's predictive index was 59; therefore, he was not entitled to further consideration for a Key scholarship.

[3] Specifically, black residents of Maryland were limited to attending one of the four "black colleges" in the state: Bowie State, Coppin State, Morgan State, and University of Maryland Eastern Shore.

Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), Congress enacted Title VI of the Civil Rights Act of 1964 which forbids federal fund recipients from discriminating in any manner on the basis of race, color, or national origin. 42 U.S.C. § 2000d *et seq.* (1964). In 1969, the Office for Civil Rights ("OCR") of the Department of Health, Education, and Welfare (now the Department of Education) notified Maryland that its higher education system was still segregated in violation of Title VI. If OCR is unable to obtain compliance with Title VI, it is authorized to initiate formal administrative proceedings against the offending institution. OCR has never initiated formal proceedings against UMCP.

Between 1969 and 1974, Maryland submitted three desegregation plans to OCR. After rejecting the first two, OCR accepted the third plan in 1974. In 1975, the Acting Director of OCR informed the state that it was still in violation of Title VI. In 1978, OCR published new guidelines which set forth criteria required for preparation of acceptable plans for post secondary public education.

In 1980, Maryland adopted the *Equal Educational Opportunity Plan for 1980-1985* ("1980-85 Plan"), in which it attempted to meet the requirements of the 1978 guidelines. The 1980-85 Plan contained many goals, one of which was a freshmen class at UMCP that included between ten to twelve percent black students by the year 1985. The Banneker Program was not mentioned in this plan. In May 1985, UMCP specifically mentioned the Banneker Program to OCR when it submitted a "Black Undergraduate Recruitment Program." In June 1985, the State adopted the *Plan to Assure Equal Post Secondary Educational Opportunity 1985-89* ("1985-89 Plan"). In

this plan, Maryland established a goal of fourteen percent black freshmen at UMCP by the year 1989. No mention was made of the Banneker Program.

In its comments to the 1985-89 Plan, OCR noted that UMCP presented "a detailed discussion of recruitment measures which include listings of recruitment tools, outreach strategies, on-campus programs, summer programs, activities to attract prospective black applicants, recruitment visitors and follow-up procedures." Appendix ("App.") at 310. OCR, however, did not directly acknowledge the Banneker Program. In 1987, UMCP submitted a revised "Black Undergraduate Recruitment Program" in which it listed the Banneker Program as an example of the expanded merit-based financial aid for minority students.

OCR is currently visiting public institutions of post secondary education to determine the progress made under the 1985-89 Plan. Maryland states that it will continue to follow the goals set forth in the 1985-89 Plan until a new one is developed. Accordingly, UMCP plans to continue offering the Banneker scholarships to black freshmen.

Discussion

[1] We review a decision granting summary judgment *de novo*. *See e.g. Miller v. Federal Deposit Ins. Corp.*, 906 F.2d 972, 974 (4th Cir.1990).

[2] The trial court correctly found that the Banneker Program should be examined in light of the equal protection clause of the Fourteenth Amendment and subjected to a strict scrutiny test. To survive strict

scrutiny, as the trial judge noted, an affirmative action plan must serve "a compelling governmental interest" and be "narrowly tailored to the achievement of that goal." App. at 158 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S.Ct. 1452, 1847, 90 L.Ed.2d 260 (Powell, J.) (1986)).

In *Wygant*, the Supreme Court held that "societal discrimination" was a concept too amorphous in nature to supply the justification for a race-conscious classification. *Id.* at 276, 106 S.Ct. at 1848 (plurality opinion). Because of the danger of stigmatic harm, classifications based on race, understandably, must be reserved for remedial settings. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 109 S.Ct. 706, 720-21, 102 L.Ed.2d 854 (1989).

At issue in *Croson* was a plan adopted by the City of Richmond requiring general contractors who were awarded city construction contracts to subcontract at least thirty percent of the total dollar amount of each contract to a "Minority Business Enterprise," a business at least fifty-one percent owned and controlled by individuals of certain specified racial and ethnic minorities. The Court found that the city had failed to demonstrate a compelling governmental interest which justified the plan. *Id.* at 505, 109 S.Ct. at 727. Finding it significant that the city was unable to point to any identified discrimination in the Richmond construction industry, the Court rejected Richmond's claim that past societal discrimination could justify racial set-asides. *Id.* at 505-06, 109 S.Ct. at 727. The Court emphasized that Richmond must have a "strong basis in evidence for its conclusion that remedial action ...[is] necessary." *Id.* at 500, 109 S.Ct. at 724 (quoting *Wygant*, 476 U.S. at 277, 106 S.Ct. at 1848).

Classification based upon race must be justified by specific judicial, legislative, or administrative findings of past discrimination. *Id.* 488 U.S. at 497, 109 S.Ct. at 722 (quoting *University of California Regents v. Bakke*, 438 U.S. 265, 307, 98 S.Ct. 2733, 2757, 57 L.Ed.2d 750 (1978)). It is the state that must show the existence of prior discrimination, and a strong evidentiary basis for concluding that remedial action is necessary. *Id.* 488 U.S. at 500, 109 S.Ct. at 724.

The district court stated that "[t]he question ... [is] whether UMCP has demonstrated with sufficient particularity that it has a history of racial discrimination which can justify the Banneker Program's existence." App. at 160. In answering this question, the court found OCR's administrative "findings" concerning the noncompliance of Maryland with Title VI demonstrated past discrimination.[4] The court rejected appellant's view

---

[4] In the amicus brief of the State of Ohio, *et al.*, it is argued that a state has a compelling interest in the promotion of racial diversity that would support the Banneker Program. The district court did not cite the need for diversity as a basis for this program, and it does not appear that UMCP established the Banneker Program with this goal in mind. Moreover, in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), the Court stated that:

> The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program [a set-aside number of places for certain minorities], focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Id. at 315, 98 S.Ct. at 2761 (emphasis in original). In this case, the scholarship funds are set aside for black students

that a formal court or administrative agency finding of noncompliance was necessary in order to satisfy the evidentiary standard in *Croson*, 488 U.S. 469, 109 S.Ct. at 706, finding that *Croson's* "strong basis in evidence" was satisfied in this case.[5]

Once a court has determined that a state has proceeded upon strong evidence of discrimination in other than the immediate past, the inquiry into the legitimacy of a race-based classification turns to the state's basis for finding continuing effects of such past discrimination. In *Bakke*, a case involving explicit racial classifications in the admissions process of a graduate school, the Supreme Court stated that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the *disabling effects* of identified discrimination." *Bakke*, 438 U.S. at 307, 98 S.Ct. at 2757 (emphasis added). By focusing the inquiry on the present-day effects, the Court limited the race-based action to redressing the present continuing manifestations of past discrimination. In *Wygant*, the Court continued to emphasize that the legitimate objective behind such

---

only and ethnic diversity does not appear to be the real interest behind the program.

[5] Stating that "[i]f ever there was an administrative record demonstrating past discrimination, this is it," app. at 161A, the court found that OCR's findings, together with continuing OCR review of UMCP's desegregation efforts, were sufficient to demonstrate a past history of discrimination. The court stated that even if no federal officer knew about or approved of the Banneker Program, it was "largely irrelevant." The court went on to find, however, that the fact that OCR reviewed and revised the recruitment plans submitted by UMCP indicated that OCR knew about the Banneker Program.

affirmative action policies is to remedy "the *present effects* of past discrimination." *Wygant*, 476 U.S. at 280, 106 S.Ct. at 1850 (emphasis added) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480, 100 S.Ct. 2758, 2775, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.)).

In *Croson*, the court stated that "if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." *Croson*, 488, U.S. at 492, 109 S.Ct. at 720. Thus, *Croson* indicates that race-based action may be legitimate governmental action if it is designed to "dismantle" or remedy discriminatory aspects of a system. The court obviously intended that for a program to withstand scrutiny, there must be some discriminatory effect which could be the subject of present remediation.

Although it recognized that the program could not withstand scrutiny unless the state could cite present effects of past discrimination, the district court wavered at this point. The court began its analysis of present effects by observing that there was "some evidence" that there were *no present effects* of past Title VI violations at UMCP. Specifically, the court noted that in 1989, UMCP exceeded its goal for recruiting black freshmen, and nearly met its goal for retention of black undergraduates. The record before this court indicates that during the academic years 1989 and 1990, more than fifteen percent of the incoming freshmen class was black.

Moreover, the court observed that the President of UMCP testified that, with regard to admission and

financial aid, UMCP had not discriminated against blacks for many years. Although the President of UMCP referred to the "lingering effects of historic discrimination" in his deposition, app. at 453, he did not explain what he meant. As indicated in *Croson*, general societal harm is insufficient.

The district court concluded that the effects of longstanding discrimination were so pervasive that it was "premature to find that there are no present effects of past discrimination at the institution." *Id.* at 167A. Later, the district court referred to the "now-dormant specter of past discrimination." *Id.* Based upon this language, it appears that the district court, although recognizing the need to identify some present effect of past discrimination, failed to make a specific finding of such present effect. Rather, it merely found that it would be prudent to keep the race-exclusionary scholarship in place at least until OCR concluded its investigation of UMCP.[6] While this might be perceived as fair to UMCP, it does not satisfy constitutional standards. As indicated earlier, in order to justify a race-based remedy in a case where identifiable discrimination occurred a number of years in the past, a finding of such past discrimination is not sufficient. There must be some present effect of this past discrimination that the program is designed to redress.

---

[6] The district court found that although "an indefinite program would violate the equal protection clause ... at least until OCR has determined that UMCP is in compliance with Title VI, the Banneker program's continuing existence does not offend the Constitution." App. at 169-70A.

Conclusion

In determining whether a voluntary race-based affirmative action program withstands scrutiny, one cannot simply look at the numbers reflecting enrollment of black students and conclude that the higher educational facilities are desegregated and race-neutral or vice versa. It may very well be, given the complexities of institutions of higher education and the limited record on appeal, that information exists which provides evidence of present effects of past discrimination at UMCP, but no such evidence was brought to our attention nor is it part of the record. The Supreme Court has declared that in some situations the State *may* enact a race-exclusionary remedy in an attempt to eliminate the effects of past discrimination. The proper focus at this stage is whether present effects of past discrimination exist and whether the remedy is a narrowly tailored response to such effects.[7]

Judgment for appellees must be based on facts which show that vestiges of past discrimination existed, which made the 1988-90 form of the Banneker Program a legitimate, constitutional remedy on or about the time appellant was denied the opportunity to compete for the scholarship. Accordingly, we hereby reverse the grant of

---

[7] On appeal, appellant has also contended that the Banneker Program is not narrowly tailored and that he is entitled to an order requiring UMCP to consider him for a Banneker Scholarship. The program may be valuable as a recruitment tool, but the value of the much-expanded program, as opposed to the program in its more limited form or other non-race-based remedies, is not clear. Because we are remanding the case for further determination, we do not resolve these issues at this time.

summary judgment and remand this action to the district court for a determination as to the present effects of past discrimination at UMCP. Should no further evidence be available upon remand, summary judgment for appellant would be appropriate.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL J. PODBERESKY	*	
	*	
v.	*	Civil Action No.
	*	JFM-90-1685
WILLIAM E. KIRWAN,	*	
President of the	*	
University of Maryland	*	
at College Park,	*	
and the University of	*	
Maryland at College Park	*	

****

MEMORANDUM

Daniel J. Podberesky, a freshman at the University of Maryland at College Park ("UMCP"), challenges UMCP's Benjamin Banneker Scholarship Program. Banneker scholarships are available only to black students, and Podberesky (who is Hispanic) was denied consideration for one. He has sued UMCP and William E. Kirwan, the president of UMCP. Podberesky seeks injunctive and compensatory relief under 42 U.S.C. §§1981, 1983 and 2000d. Discovery has been completed, and he and defendants have both moved for summary judgment.

I.

A. The Immediate Controversy

Banneker scholarships currently provide full financial support for four years of study at UMCP. They

each have an estimated value of $33,500. They also provide certain other benefits to their recipients, including admission to UMCP's Honors Program, participation in the Scholars Preceptorship Program, and inclusion in the President's Colloquium. The scholarships are awarded each year to black high school seniors on the basis of merit. In the fall of 1990 the minimum eligibility requirements were a 900 SAT score and a 3.0 grade point average. Podberesky met these requirements, having scored 1340 on the SAT exam and having maintained an unweighted grade point average of 3.56. He applied for a Banneker scholarship but was not considered because he is not black. Twenty-eight Banneker scholarships were ultimately awarded to students entering UMCP in the fall of 1990.

B. Background of the Banneker Scholarship Program

The Banneker program is rooted in a protracted controversy between the Office of Civil Rights ("OCR") of the Department of Health, Education and Welfare and the State of Maryland concerning desegregation of Maryland's system of higher education. The story begins in March 1969, when OCR first informed the State that its system of higher education was in violation of Title VI of the Civil Rights Act of 1964. See Mandel v. Hew, 411 F. Supp. 542, 547 (D. Md. 1976), aff'd, 571 F.2d 1273 (4th Cir. 1978), cert. denied, 439 U.S. 862 (1978); Adams v. Richardson, 356 F. Supp. 92, 94 (D.D.C. 1973), modified, 480 F.2d 1159 (D.C. Cir. 1973). Over the next six years, Maryland officials submitted three separate plans in an attempt to comply with Title VI. The first two were rejected in 1970 and 1973, respectively. See Mandel, 411 F. Supp. at 547-48. On December 15, 1975 the Acting Director of OCR

decisively rejected the third plan. He wrote to Governor Mandel that "the State of Maryland, its agencies and its state-operated institutions of higher education are not operating in compliance with Title VI of the Civil Rights Act of 1964" and advised the Governor that he was preparing to commence formal enforcement proceedings. See Mandel, 441 F. Supp. at 550.

In response, the State of Maryland obtained an injunction ordering OCR to seek voluntary compliance before initiating enforcement proceedings. See id. In 1980 the State voluntarily submitted a fourth compliance plan to OCR. OCR and the State continued negotiating and in 1985 the State submitted yet a fifth plan (the "1985-89 Plan"). On June 3, 1985 OCR accepted the 1985-89 Plan as "compliance with Title VI for the life of the plan" and entered into a stipulation of dismissal of the Mandel litigation.

The 1985-89 Plan expired in June 1990. Maryland officials are currently preparing for an OCR inspection to determine whether the State is finally in compliance with Title VI. Until this OCR inspection is completed -- and until OCR notifies the State this it is finally in compliance with Title VI -- the State has stated its intention to continue to abide by the 1985-89 Plan. The State anticipates that the final OCR review will not be completed for two or three years.

The Banneker program was established in 1979 as part of the State's effort to achieve Title VI compliance. Although neither the 1980 plan nor the 1985-89 plan explicitly refer to the program, both plans emphasize the need to increase "other race grants," a generic name for scholarships, such as the Banneker program, aimed at

increasing the representation of historically underrepresented racial groups at public higher education institutions in Maryland.

II.

I must resolve several preliminary issues before addressing the merits of Podberesky's claims.

A. Standing

Defendants first contend that Podberesky's claim for injunctive relief is not justiciable under Article III because he lacks standing to assert it. The Supreme Court has articulated three elements of standing: injury, causation, and redressability. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (citations omitted); see also Allen v. Wright, 468 U.S. 737, 751 (1984). Each of these elements is satisfied in this case.

In order to satisfy the first element, Podberesky must have suffered a "distinct and palpable injury," Warth v. Seldin, 422 U.S. 490, 501 (1975), one that is "'real and immediate,' not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (citations omitted). Denial of an equal opportunity for consideration for a benefit or privilege

can give rise to an injury conferring standing. For example, in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 n.14 (1978) (Powell, J.), the plaintiff's injury lay "in the University's decision not to permit [him] to compete for all 100 places in the [Medical School] class, simply because of his race . . . . Hence the constitutional requirements of Art. III were met." See also Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 356 (S.D.N.Y. 1989); C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3531.4, at 430 (1984) ("loss of opportunity may constitute injury, even though it is not certain that any benefit would have been realized if the opportunity had been accorded"). Here, Podberesky unquestionably was denied an equal opportunity to compete for a Banneker scholarship, solely because of his race.

Second, Podberesky's injury must be "fairly traceable to the Government conduct [he challenges] as unlawful." Allen, 468 U.S. at 737. The causation element is also clearly satisfied in this case. Podberesky was denied consideration for a Banneker scholarship because of his race; in this case he challenges the Banneker program's racially exclusive eligibility requirement.

Finally, Podberesky's injury must be "likely to be redressed by a favorable decision." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976). In other words, he must "stand to profit in some personal interest" if this court ultimately rules in his favor. Id. at 39. In Simon the plaintiffs lacked standing because it was "purely speculative" whether a favorable ruling would lead to any meaningful relief for them. Id. at 42. Similarly, in City of Los Angeles v. Lyons, 461 U.S. 95,

105 (1983), the Court ruled that a person who had allegedly been subjected to an unconstitutional chokehold administered by the Los Angeles Police Department lacked standing to seek injunctive relief prohibiting the use of chokeholds in the future because he was unable to demonstrate that he was under a "real and immediate threat" of again enduring mistreatment at the hands of the police.

Defendants argue that this case is directly analogous to Lyons. They point out that by virtue of a provision which Podberesky does not challenge, the Banneker program is open only to high school seniors. Podberesky has already enrolled at UMCP, and he will never again be in a position to be considered for a Banneker scholarship. Thus, argue the defendants, there is no threat whatsoever that he will be the victim of discrimination in the awarding of future Banneker scholarships.

While defendants' analysis is correct as far as it goes, it does not go far enough. As discussed in Section II B, infra, a denial of equal opportunity can be redressed by closing the opportunity to all persons as well as by extending it to plaintiff. Thus, if Podberesky was unlawfully denied consideration for a Banneker scholarship, he may seek a judicial mandate withdrawing the scholarships from those who have received them even if it would be inappropriate for the court to order that one be granted to him. See Heckler v. Mathews, 465 U.S. 728, 740 (1984).

B. Scope of Available Relief Under Title VI

Podberesky seeks both prospective and

compensatory equitable relief under Title VI, 42 U.S.C. § 2000d.[1] It is clear that under Title VI prospective relief is available to private plaintiffs in appropriate cases. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). Although Guardians is somewhat difficult to decipher, it likewise appears clear that as a general matter compensatory equitable relief may be awarded to private plaintiffs under Title VI. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 (1984) ("in Guardians . . . a majority of the Court expressed a view that a private plaintiff under Title VI could recover back pay") (unanimous opinion).

The question of whether such relief can be granted absent a bad faith violation of the statute is somewhat murkier. Guardians appeared to hold that plaintiffs need not show bad faith in order to obtain compensatory relief, but this point is not entirely free from doubt. Four Justices clearly would have placed no restrictions upon the equitable relief to which a prevailing plaintiff is entitled under Title VI. 463 U.S. at 624-34 (Marshall, J.); id. at 635-39 (Stevens, J.; Brennan, J.; and Blackmun, J.). However, two of the Justices stated the view that only a knowing and intentional violation of Title VI can give rise to compensatory equitable relief, id. at 597 (White, J. and Rehnquist, J.), and two other Justices expressed no opinion on the question. Id. at 607-11 (Powell, J. and Burger, C.J.). Although the ninth Justice

---

[1] Podberesky has not asserted any claim for damages as such under Title VI. The availability of damages is a separate question from the availability of compensatory equitable relief. See, e.g., Rhodes v. Charter Hosp., 730 F. Supp. 1383, 1385 (S.D. Miss. 1989); Bradford v. Iron County C-4 School Dist., 37 Empl. Prac. Dec. (CCH) ¶ 38,610 (E.D. Mo. June 13, 1984).

(Justice O'Connor) appeared to agree with the four who would have placed no restrictions upon the right to equitable relief, her position was not pellucid.[2] Id. at 612.

I need not decide the question here in light of the fact that, as stated infra, I find that the Banneker program does not violate Title VI. Furthermore, even if I were so to find, I would not exercise my equitable powers to grant Podberesky any compensatory equitable relief. Since the Banneker program was established solely for the purpose of recruiting and retaining black students at UMCP and since Podberesky is not black, to award him the functional equivalent of a Banneker scholarship would be to grant him a benefit to which he never would have been entitled. See Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984) (quoting Califano v. Westcott, 443 U.S. 76, 94 (1979)) (observing that "a court should not, of course,

---

[2] Justice O'Connor accepted Justice Stevens's analysis of the remedial question: "For reasons given in Part I of the dissent by Justice Stevens, . . . I cannot agree with the limitations that Justice White's opinion would place on the scope of equitable relief available to private litigants suing under Title VI." Guardians, 463 U.S. at 612. In a footnote to that sentence, she declined to "address the question whether there is a private cause of action under Title VI for damages relief." Id. at n.1. It appears that that footnote is irrelevant to the issue at hand, for the availability of a damages remedy is separate from the question raised by Justice White: a good-faith limitation on retrospective equitable relief under Title VI. Justice O'Connor may well have had independent reasons for declining to address the existence of a damages remedy under Title VI. See Bradford v. Iron County C-4 School Dist., 37 Empl. Prac. Dec. (CCH) ¶ 38,610 (E.D. Mo. June 13, 1984) (concluding that Title VI offers equitable remedies only). Nevertheless, the footnote might possibly be read to evince a broader objection to the granting of compensatory relief.

'use its remedial powers to circumvent the intent of the legislature'").

This is not a case where a plaintiff was deprived of the opportunity to attend an institution to which it is likely that he would have been admitted but for an unlawful racial preference. Cf. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (Powell, J.). Nor it is a case where pre-existing scholarship funds were diverted from general usage to the benefit of a particular minority group. Therefore, assuming that Banneker scholars have received something which they should not have received, this does not ipso facto mean that Podberesky is entitled to receive the same benefits which have been conferred upon them. Rather, if the Banneker program is unlawful, the appropriate relief would be to enjoin its continued existence. See Heckler, 465 U.S. at 740 (holding that when a court finds an equal protection violation, "the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class"); C. Wright, A. Miller & E. Cooper, supra, § 3531.6 at 486-87.

B. Scope of Available Relief Under 42 U.S.C. §§ 1981 and 1983

The parameters of Podberesky's cognizable claims under 42 U.S.C. § 1983 can be clearly delineated. He has no claim against UMCP because, as he concedes, UMCP is an arm of the state and states are not "persons" within the meaning of § 1983. See Will v. Michigan Dep't. of State Police, 109 S. Ct. 2304 (1989); Bickley v. University of Md., 527 F. Supp. 174, 182 (D. Md. 1981). He likewise may not seek monetary damages

from Kirwan since he is suing Kirwan only in his official capacity. Will, 109 S. Ct. at 2311. He may, however, seek prospective relief against Kirwan under § 1983 because a suit for injunctive relief against a state official is not treated as a suit against the state. Id. at n.10; Ex parte Young, 209 U.S. 123, 159-60 (1908).

Podberesky's § 1981 claims raise the question of whether entitlement to a scholarship is a "contract" right within the meaning of the section. The answer to this question is not self-evident. However, assuming that § 1981 covers scholarship benefits (and assuming that § 1981 extends to states)[3], Podberesky has failed to

---

[3] This assumption may be dubious in light of Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989). There, the Supreme Court held that because a municipality is subject to suit for damages directly under § 1983, it is not subject to suit under § 1981. Although the logic of this holding would not extend to states in light of the holding in Will that states are not "persons" subject to suit under § 1983, the breadth of the language of Jett suggests that no local or state government is subject to suit under § 1981. Id. at 2722 ("§ 1983 . . . provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor"). This result, however, seems to be somewhat paradoxical in light of the fact that Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Runyon v. McCrary, 427 U.S. 160 (1976); and Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) - which held that § 1981 prohibits racial discrimination in making and enforcement of private contracts - all proceeded from the unspoken premise that § 1981 applies to public actors. Cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421 (1968) ("On its face . . . § 1982 appears to prohibit all discrimination against Negroes in the sale or rental of property - discrimination by private owners as well as discrimination by public authorities").

establish that defendants have waived their Eleventh Amendment immunity. Thus, like his § 1983 claim, Podberesky's § 1981 claim can give rise only to prospective injunctive relief.[4]

The only evidence to which he points in seeking to demonstrate that an Eleventh Amendment waiver has occurred is a letter to his counsel dated August 1, 1990 from the assistant attorney general representing defendants in this action. That letter provides that Podberesky's UMCP bill will "not be due and payable if the University awards plaintiff a full-financial support scholarship as a result of an order of the Court." In return, Podberesky agreed not to seek a temporary restraining order or a preliminary injunction and not to file an action in any other court until the issuance of a final judgment by this Court.

Podberesky cites Moreno v. University of Md., 645 F.2d 217 (4th Cir. 1981), aff'd sub nom. Toll v. Moreno, 458 U.S. 1 (1982) in support of his waiver argument. In Moreno the district court found that the University of Maryland's rules for awarding in-state

---

Perhaps this paradox is lessened by the fact that rights created by § 1981 may be enforced by § 1983 suits brought for prospective relief against state officials in their official capacity. See Will, 109 S. Ct. at 2311 n.10. Furthermore, as discussed in Section III B, infra, it appears to be settled that § 1981 creates no greater substantive right against a state actor than does the Fourteenth Amendment itself (which, of course, is independently enforceable under § 1983).

[4] Podberesky's claim for prospective relief under § 1981 is unaffected by the absence of a waiver of Eleventh Amendment immunity. The Eleventh Amendment bars only those suits seeking retrospective relief. Edelman v. Jordan, 415 U.S. 651, 667 (1971).

tuition violated the constitutional rights of non-immigrant aliens. It ordered the University to alter its policy in the future. Moreno v. University of Md., 420 F. Supp. 541, 565 (D. Md. 1976). The University obtained a stay of the district court's order pending appeal. It did so by promising to refund the difference between in-state and out-of-state tuition for all non-immigrant aliens from the date of the district court's order if that order was "finally affirmed on appeal." Moreno, 645 F.2d at 219. Some years later, after proceedings in the Supreme Court, the district court's ruling was affirmed, though on different grounds. When the plaintiff class sought a refund in accordance with the agreement which had been reached, the University tried to raise the Eleventh Amendment as a defense. In a per curiam opinion, the Fourth Circuit rejected the University's argument. It held that by representing that it would refund the contested tuition payments in the event of an adverse result on appeal, the University had waived its Eleventh Amendment immunity. Id. at 220. See also Vargas v. Trainor, 508 F.2d 485, 492 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975) ("[a] representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the [waiver] requirements").

In the present case the State has made no representation to the court concerning the forgiveness of Podberesky's UMCP bill. Moreover, in Moreno the University had not raised any Eleventh Amendment claim during the pendency of the stay. In contrast, in the present case defendants have actively litigated their immunity defense. Thus, the clear intent and meaning of the August 1, 1990 letter agreement was that the University would forgive Podberesky's UMCP bill if (but only if) I were to reject its Eleventh Amendment immunity defense and otherwise rule against it.

III.

Turning now to the merits, I will assess Podberesky's claims under each of the three statutes he invokes.

A. Title VI

In Guardians the Supreme Court held that Title VI is coextensive with the Fourteenth Amendment. 463 U.S. 582, 610-11 (1983) (Powell, J.); id. at 612 (O'Connor, J.); id. at 639-42 (Stewart, J.). Thus, the Banneker program must be evaluated under the equal protection clause of the Fourteenth Amendment.

Perhaps the central principle to emerge from the Supreme Court's affirmative action cases is that courts must apply strict scrutiny to affirmative action plans implemented by state actors.[5] City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721-23 (1989) (O'Connor, J.); id. at 735 (Scalia, J.); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (Powell, J.); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (Powell, J.). This is so despite the fact that affirmative action may be motivated by benign intentions, see, e.g., Croson, 109 S.

---

[5] A different standard is used for affirmative action plans implemented by Congress, see Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3009 (1990) (Congressionally-mandated programs must "serve important governmental objectives within the power of Congress and [must be] substantially related to the achievement of those objectives"), and private employers, see Johnson v. Transportation Agency, 480 U.S. 616, 631, 637 (1987) (private employer's plan must seek to redress a "manifest imbalance" in the composition of its workforce and must not "unnecessarily trammel" the rights of others).

Ct. at 721 (O'Connor, J.), and that affirmative action may burden members of the white "majority." See, e.g., id.; Bakke, 438 U.S. at 295-99 (Powell, J.). To survive strict scrutiny, an affirmative action plan must serve "'a compelling governmental interest'" and be "'narrowly tailored to the achievement of that goal.'" Wygant, 476 U.S. at 274 (Powell, J.) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984) and Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)). See also Croson, 109 S. Ct. at 721 (O'Connor, J.).

1. Does the Banneker program serve a compelling governmental interest?

In this case, the defendants argue that the Banneker program serves the "compelling" goal of remedying the effects of past discrimination at UMCP.[6] Podberesky concedes that this is a constitutionally permissible goal, and in fact the Supreme Court has repeatedly held that states may adopt race-conscious remedies to counteract the effects of past discrimination. See, e.g., Croson, 109 S. Ct. at 727; id. at 729 (O'Connor, J.) (noting, however, that such remedies are available only "[i]n the extreme case"); id. at 734 (Kennedy, J.) (similar proviso); United States v. Paradise, 480 U.S. 149, 166-67 (1987) (Brennan, J.); Wygant, 476 U.S. at 277 (Powell, J.); Bakke, 438 U.S. at 307 (Powell, J.); id. at 325 (Brennan, J.). See also Uzzell v. Friday, 625 F.2d 1117, 1121 (4th Cir. 1980).

To survive strict scrutiny, there must be evidence

---

[6] Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) is accordingly inapposite. In that case, there was "no showing that defendants were guilty of past discrimination." Id. at 384.

of past discrimination in the specific context which the challenged program aims to remedy. Croson underscores the fact that a general history of societal discrimination, standing by itself, cannot justify state-imposed affirmative action. Croson, 109 S. Ct. at 723; see also Wygant, 476 U.S. at 276 (Powell, J.). As the Supreme Court observed in Croson, "a generalized assertion that there has been past discrimination in an entire industry . . . 'has no logical stopping point'" and could lead to a society built around rigid racial quotas. Croson, 109 S. Ct. at 723 (quoting Wygant, 476 U.S. at 275 (Powell, J.)).

In this case, the defendants do not attempt to justify the Banneker program by pointing to a general history of societal discrimination. Instead, they argue that the Banneker program is necessary to remedy the effects of past discrimination at UMCP. The question thus becomes whether UMCP has demonstrated with sufficient particularity that it has a history of racial discrimination which can justify the Banneker program's existence. The evidentiary showing necessary to sustain a claim of past discrimination was one issue which commanded a majority in Croson. Under Croson, proponents of affirmative action must satisfy a rigorous evidentiary burden: there must be "'a strong basis in evidence for [a] conclusion that remedial action is necessary.'" Id. at 724 (quoting Wygant, 476 U.S. at 277 (Powell, J.)).[7]

---

[7] Although this discussion is framed in terms of the defendant's evidentiary burden in showing a past history of discrimination, plaintiffs in affirmative action cases "continue to bear the ultimate burden of persuading the court that the... evidence [does] not support an inference of prior discrimination and thus a remedial purpose, or that [a] plan... [is] not sufficiently 'narrowly tailored.'" Wygant, 476 U.S. at 293 (O'Connor, J.).

In this case, the defendants rely on OCR's findings to satisfy the Croson burden. The plurality opinion in Croson supports the premise of this argument: "for the governmental interest in remedying past discrimination to be triggered 'judicial, legislative, or administrative findings of constitutional or statutory violations' must be made." Croson, 109 S. Ct. at 723 (O'Connor, J.) (quoting Bakke, 438 U.S. at 307 (Powell, J.)). Although not accepted by five Justices in Croson; this standard comports with the spirit underlying the majority opinion.[8] Thus, if in this case the federal government has made sufficient findings of statutory violations at UMCP, the Banneker program may be viewed as serving the "compelling" purpose of remedying past discrimination.

The historical record discussed in Section I B, supra, makes it abundantly clear that there is a history of past discrimination at UMCP. The defendants have produced an overwhelming compilation of historical evidence, replete with administrative findings, protracted litigation, and continuing OCR review of UMCP's efforts. Although the 1985-89 Plan was accepted as compliance with Title VI during its life, OCR still has not certified that Maryland is in final compliance with Title VI. If ever there was an administrative record demonstrating past discrimination, this is it. Cf. Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, 454 U.S. 1211 (1981) (similar history justified race-conscious hiring at Arkansas State University);

---

[8] More precisely, it may be viewed as a sufficient, but not a necessary means of satisfying the evidentiary burden established by five Justices in Croson. Requiring a past official finding of a constitutional or statutory violation would appear to be more severe than mandating merely a "'strong basis in evidence.'" Croson, 109 S. Ct. at 724 (quoting Wygant, 476 U.S. at 277 (Powell, J.)).

Zaslawsky v. Board of Educ., 610 F.2d 661 (9th Cir. 1979) (similar history justified staff integration plan in Los Angeles public schools).

Podberesky makes a number of arguments to the contrary. First, he contends that "no Federal agency has ever found that Maryland operated a racially segregated system of higher education in violation of Federal law." This contention is simply contrary to the factual record.

Second, he argues that OCR's findings are insufficient to demonstrate a history of discrimination. According to Podberesky, a "court or agency administrative body" would need to find noncompliance in order to satisfy Croson's evidentiary standard. This argument has far-reaching implications. If it were accepted, a violator of Title VI would be required to engage in extended litigation in order to insulate any remedial program from subsequent challenge - even if it accepted its obligation to stop violating Title VI. This might present Article III problems under the "feigned case" doctrine, and it certainly would be a waste of judicial resources. Moreover, it flies in the face of Title VI's policy favoring voluntary compliance. See 42 U.S.C. § 2000d-1; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289-91 (1986) (O'Connor, J.).

In addition, the rationale behind the Croson decision does not support Podberesky's contention. According to the Croson plurality, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race." City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721 (1989). Where an affirmative action plan is adopted in response to a federal agency's determination, it is unlikely that a state is attempting to advance any "illegitimate uses of race." On the contrary, the state is merely responding

to a federally-imposed mandate. Thus, Podberesky's argument finds no support in the theory that animated Croson.[9]

Third, Podberesky argues that OCR's conclusion that the State of Maryland violated Title VI was premised on an erroneous interpretation of the law, and therefore has no validity. Specifically, he contends that OCR misapprehended both the definition of "program or activity" under Title VI and the necessity of affirmative remedies for past constitutional violations. His first point is meritless in light of 42 U.S.C. § 2000d-4a, which legislatively overruled Grove City College v. Bell, 465 U.S. 555 (1984), and restored a broad definition of Title VI's "program or activity" standard. Likewise, assuming that OCR did err in taking the position that a university has the obligation to undertake affirmative action to

---

[9] Lower courts have generally rejected the notion that judicial or administrative adjudicatory findings of discrimination are necessary to uphold affirmative action plans. See Palmer v. District Bd. of Trustees, 748 F.2d 595, 600 n.14 (11th Cir. 1984); Zaslawsky v. Board of Educ., 610 F.2d 661, 663-64 (9th Cir. 1979); Chicago Fire Fighters Union Local 2 v. Washington, 736 F. Supp. 923, 928 (N.D. Ill. 1990). Cf. Kromnick v. School Dist., 739 F.2d 894, 905 (3d Cir. 1984), cert. denied, 469 U.S. 1107 (1985) (court order present, but not necessarily required); Valentine v. Smith, 654 F.2d 503, 509 (8th Cir. 1981), cert. denied, 454 U.S. 1211 (1981) (same; possibly erroneous interpretation of court order). But cf. Uzzell v. Friday, 625 F.2d 1117, 1120 (4th Cir. 1980) (affirmative action may be justified "to redress wrongs worked by adjudicated instances of racial discrimination"; decision predates Croson by over eight years) (emphasis added); Caulfield v. Board of Educ., 632 F.2d 999, 1006 (2d Cir. 1980), cert. denied, 450 U.S. 1030 (1981) (OCR finding insufficient to demonstrate need for race-conscious remedy; decision predates Croson by more than eight years).

remedy equal protection violations, see Ayers v. Allain, 914 F.2d 676, 687 (5th Cir. 1990), cert. granted sub nom. United States v. Mabus, 59 U.S.L.W. 3695 (U.S. Apr. 15, 1991) (No. 90-1205), that is not the issue in this case. The Banneker program was not imposed on UMCP; UMCP voluntarily agreed to it and is now defending it as its own. The constitutionality of the program is, therefore, not dependent on whether a court or OCR can require affirmative remedies for a Title VI violation. Cf. Geier v. Alexander, 801 F.2d 799, 805 (6th Cir. 1986) (noting that no "case had held, or even hinted that affirmative remedies are not available to remove the vestiges of past unlawful segregation") (emphasis added). Its constitutionality is governed by the standard set forth in Croson: whether UMCP possesses a "strong basis in evidence" for the conclusion that there is a history of discrimination at UMCP.

Fourth, Podberesky asserts that no federal official has ever approved the Banneker program. Even if this assertion is correct - which does not appear to be the case - it is largely irrelevant.[10] The question under Croson

---

[10] The 1985-89 Plan commits the State to "review and revise, as appropriate, institutional recruitment plans within 90 days, after acceptance of this plan." OCR's acceptance of the 1985-89 Plan was expressly conditioned on timely receipt of recruitment plans. The Banneker program is mentioned repeatedly in UMCP's recruitment plan submissions.

In the spring of 1985, commenting on UMCP's recruitment plan, OCR advised UMCP to "increase number and amount of existing awards" of "[f]inancial aid (need-based and merit-based) designated for black students." In a subsequent recruiting plan submission, dated May 23, 1985, UMCP informed OCR about the Banneker program (which then provided an annual stipend of $1,000). In late 1986 OCR replied, commenting that the May 23, 1985 recruitment plan "adheres to the monitoring guide . . . provided to UMCP

is simply whether there is a "strong basis in evidence" sufficient to justify affirmative race-based remedies for past discrimination. This question is to be resolved in the final instance by the courts, not OCR administrators. Accord United States v. Paradise, 480 U.S. 149 (1987) (affirmative action plan upheld despite Department of Justice's opposition); Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986) (same).

Fifth, Podberesky argues that time has nullified the force of OCR's past findings of discrimination. He contends that even if OCR's findings could, in the past, have justified the Banneker program, UMCP is now free from discrimination. Thus, he concludes, the continued presence of affirmative action at UMCP is little more than an unconstitutional anachronism.

This argument raises an apparently unsettled legal question: the Supreme Court's affirmative action cases do not directly address the question of when past

---

by OCR." UMCP's final recruitment plan submission, dated July 1987, also referred to the Banneker program. These documents indicate that OCR certainly knew about the Banneker program, and in fact suggested expanding it in 1985.

In response to this evidence, Podberesky offers a letter written in response to a FOIA request which states that "We [OCR] have not been able to locate any documents . . . that contain approval, acceptance, sanction, or requirement [of the Banneker program]." The letter further states that references to the Banneker program contained in certain documents provided in the FOIA request "would not constitute Department of Education approval, acceptance, sanction or requirement" of the program. The defendants argue that this letter is unpersuasive because it was written one day after Podberesky made his FOIA request and fails to address the documents cited above. I agree.

discrimination ceases to justify present remedies.[11] It seems obvious, as Justice O'Connor stated in Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986), that evidence of a remedial purpose "need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate." See also id. at 289-91. To require such findings would be inconsistent with the very notion that past discrimination can justify present affirmative action. Beyond this truism, the standard seems to be that there must be continuing effects of past discrimination to justify a race-conscious remedy. See e.g., City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 720 (1989) (O'Connor, J.) (states have authority "to rectify the effects of identified discrimination") (emphasis added); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (Powell, J.) (race may be taken into account to remedy the effects of prior discrimination) (emphasis added); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (Powell, J.) (affirming a state's interest in "ameliorating, or eliminating where feasible, the disabling effects of identified discrimination") (emphasis added). Thus, the question becomes whether present effects of past Title VI violations remain in evidence at UMCP.

Podberesky offers some evidence that they do not. He points out that in 1989, UMCP exceeded its goal for recruiting black freshmen and came close to meeting its goal for retention of black undergraduates. In addition,

---

[11] In the recent case of Board of Educ. v. Dowell, 111 S. Ct. 630, 638 (1991), the Supreme Court held that an order desegregating public schools can be vacated when "the vestiges of past discrimination [have] been eliminated to the extent practicable." Dowell is not directly relevant to this case, however, since it concerned an order requiring a school district to desegregate.

President Kirwan testified on deposition that UMCP has not discriminated against blacks in admission or financial aid for many years. Nevertheless, the effects of longstanding discrimination are pervasive, and there is ample evidence in the record before me to support the view of UMCP officials that it is premature to find that there are no present effects of past discrimination at the institution. OCR has not yet certified that UMCP is finally in compliance with the Title VI, and it is prudent for the University's officials to let OCR's evaluation run its course provided that this evaluation is concluded within the next several years. Moreover, the Banneker program itself may have been instrumental in meeting the goals for 1989. Although the program funds only a relatively small group of students, Banneker recipients apparently play an active role in the recruiting and retention of other black students. Thus, declaring that the Banneker program is no longer necessary may have the ironic result of awakening the now-dormant specter of past discrimination.

For these reasons, I hold that the Banneker program serves the compelling interest of remedying the present effects of past discrimination.

2. Is the Banneker program "narrowly tailored"?

The remaining question is whether the Banneker program is "narrowly tailored" to serve this interest. The seminal decision on this question is United States v. Paradise, 480 U.S. 149 (1987). There the Court held that remedial plans need not be "'limited to the least restrictive means of implementation.'" Id. at 184 (Brennan, J.) (quoting Fullilove v. Klutznick, 448 U.S. 448, 508 (1980) (Powell, J.)). It identified four criteria

by which to judge the nexus between a remedial plan and the interest it purports to serve: "the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." Id. at 171 (Brennan, J.).

In this case the defendants argue that the Banneker program is necessary for the recruitment and retention of black students, both of which are central features of the 1985-89 Plan. They have produced unrebutted evidence that although the Banneker program reaches only a small number of students, Banneker scholars play an important role in recruiting other black applicants and in retaining black students. This evidence demonstrates that the Banneker program is an effective means of achieving the purpose of remedying past discrimination at UMCP.

The defendants have considered alternatives to the Banneker program, and have concluded that they would be ineffective. For example, a race-blind merit-based scholarship program would "result in a minimal number of such awards made to blacks" because, according to UMCP's unrebutted evidence, black students generally do not perform as well as white students on standardized tests such as the SAT. Similarly, a merit-based scholarship program which took applicants' races into account (as opposed to requiring that applicants be black) would be ineffective at serving blacks unless the racial preferences were so strong as to be virtually indistinguishable from the Banneker program. And a program aimed at other non-white students would merely dilute UMCP's efforts to remedy past discrimination against blacks, and would in fact bear no relation whatsoever to past discrimination. Cf. City of Richmond

v. J.A. Croson Co., 109 S. Ct. 706, 728 (1989) (fact that program was aimed at "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons . . . suggests that perhaps the [defendant's] purpose was not in fact to remedy past discrimination"). Thus, the Banneker plan satisfies the first Paradise factor.

The second prong of the Paradise test demands examination of "flexibility and the duration of the relief." Paradise, 480 U.S. at 171 (Brennan, J.). The Banneker program is not very flexible. UMCP apparently has a policy of awarding at least twenty Banneker scholarships a year, although UMCP denies having any fixed minimum number of Banneker awards in any one year. And the program, of course, is only open to blacks. As for duration, UMCP has not stated precisely how long it envisions maintaining the Banneker program. It has only stated its intention to continue the program at least through the completion of the OCR review. Certainly an indefinite program would violate the equal protection clause. However, as indicated above, at least until OCR has determined that UMCP is in compliance with Title VI, the Banneker program's continuing existence does not offend the Constitution. Cf. Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 904 (3d Cir. 1984) (withdrawal of OCR-imposed desegregation obligation not dispositive in constitutional analysis).

Third, Paradise raises "the relationship of the numerical goals to the relevant labor market." Paradise, 480 U.S. at 171 (Brennan, J.). In the context of this case, this factor raises the question whether too many Banneker scholarships are granted. In light of the history of unlawful discrimination at UMCP, there is absolutely no basis on which to draw such a conclusion.

Finally, Paradise calls for an examination of the "impact of the relief on the rights of third parties." Id. Podberesky makes much of this point, arguing that the program siphons money away from scholarship programs for which he, as a non-black, would be eligible. This argument is unpersuasive. For one thing, it is factually unsupported. The record reveals that at least some of the Banneker program's funding would simply be redirected to other means of recruiting and retaining black students were the program invalidated, and there is no evidence that it would be used for additional scholarships for the general student population. Even if it were assumed that the Banneker funding would be used for that purpose, there is no evidence that the eligibility requirements for any general scholarship would be ones which Podberesky could meet. More generally, the Banneker program imposes a relatively diffuse burden on non-black students. They have numerous other sources of need- and merit-based financial aid at UMCP, so that the presence of the Banneker program does not wreak substantial hardship on any individual. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 & n.11 (1986) (Powell, J.). While a scholarship is certainly a desirable benefit, the denial of one does not create a burden analogous to a lay-off, which violates a reliance interest in continued employment. Cf. id. at 282-84; Paradise, 480 U.S. at 182-83.

B. §§ 1981 and 1983

The conclusions reached above with regard to Podberesky's Title VI claim dictate that his 42 U.S.C. §§ 1981 and 1983 claims must also fail. Although § 1981, which guarantees equal rights to "make and enforce contracts," has a different scope than the Fourteenth Amendment in that it reaches private conduct, see, e.g., Patterson v. McLean Credit Union, 109 S. Ct. 2363

(1989), it has been held that § 1981 does not prohibit affirmative action programs which pass constitutional muster. This is so because § 1981 has a legislative history which, though very complex, is intertwined with that of the Fourteenth Amendment. See, e.g., Runyon v. McCrary, 427 U.S. 160 (1976) (lengthy discussion of § 1981's legislative history). As the Sixth Circuit put it in Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 692 (1979), cert. denied, 452 U.S. 938 (1981) "The constitutional genesis of § 1981 . . . means that what the Constitution permits, § 1981 must also permit." See also Valentine v. Smith, 654 F.2d 503, 512 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1981); Local 35, Int'l Brotherhood of Elec. Workers v. City of Hartford, 625 F.2d 416, 425 (2d Cir. 1980), cert. denied, 453 U.S. 913 (1981).

As for Podberesky's § 1983 claim, it can serve in this case only as a vehicle to enforce underlying rights guaranteed by the Fourteenth Amendment, Title VI, or § 1981. Since the defendants are entitled to summary judgment under each of these statutes, the § 1983 claim necessarily fails as well.

IV.

In addition to his claims concerning the Banneker program, Podberesky mounts a weak challenge to UMCP's Francis Scott Key scholarship program, which offers racially neutral merit-based full-support scholarships. Podberesky sought a Key scholarship, but was deemed ineligible by virtue of a numerical "predictive index" calculated from his SAT score and high school grade point average. His predictive index fell below a minimum cut-off established by UMCP authorities for consideration for a Key scholarship. Although he offers a number of arguments why the Key program vio-

lated Title VI, none of them is even remotely plausible.

First, he challenges the numerical threshold requirement for consideration for a Key scholarship. He argues that the cut-off discriminated against him and others who did not satisfy it. This claim is evaluated under constitutional standards because, as noted above, Title VI is coextensive with the Fourteenth Amendment. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610-11 (Powell, J.); id. at 612 (O'Connor, J.); id. at 639-42 (Stevens, J.). The "relatively relaxed" rational-basis standard of review applies to this particular claim. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).[12] A classification reviewed under the rational-basis standard "is presumed to be valid and will be sustained if [it] is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

Here, the eligibility cut-off is plainly related to the legitimate state interest in identifying a manageable pool of qualified Key applicants for further consideration. Although the cut-off may be somewhat arbitrary, it nevertheless manifestly serves a legitimate function in simplifying the administration of the Key program. Murgia, 427 U.S. at 314-17; Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977).

---

[12] Rational-basis review is applied to equal protection claims as a "general rule." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). This rule gives way only when distinctions are based on suspect criteria (such as race or gender) or operate to restrict fundamental rights. Id. at 440-42. These exceptions are not implicated in this case since the threshold eligibility requirement is neutral and impinges upon no recognized fundamental right.

Second, Podberesky argues that the absence of any Hispanics on the Key selection committee violated Title VI. This argument is unsupported by any evidence indicating that UMCP officials discriminated against Hispanics in forming the Key selection committee. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Moreover, assuming that potential Hispanic members of the committee were the victims of discrimination, Podberesky lacks standing to raise this claim. The composition of the committee in no way affected his application for a Key scholarship; he was rejected by the mechanical operation of a racially neutral cut-off. Thus, there is no causal link between the composition of the committee and Podberesky's failure to receive a Key scholarship. See Allen v. Wright, 468 U.S. 737, 751 (1984).

Third, Podberesky decries UMCP's failure to give Hispanics any special consideration for Key scholarships. This contention is baffling and, in light of his principal contention, at best paradoxical. It appears to advocate unequal treatment of Hispanic Key applicants based solely on their race. As the foregoing discussion of the Banneker program illustrates, such a result would assuredly violate the equal protection clause absent a compelling state interest. Podberesky has failed even to suggest what such an interest might be, much less demonstrate that UMCP should be judicially ordered to adopt a race-conscious Key selection criterion. Cf. Ayers v. Allain, 914 F.2d 676, 687 (5th Cir. 1990), cert. granted, 59 U.S.L.W. 3695 (U.S. Apr. 15, 1991) (No. 90-1205) (university's obligation in remedying equal protection violations is satisfied by "implementing good-faith, race-neutral policies and procedures").

Fourth, Podberesky points out that UMCP officials initially miscalculated his high-school grade point average, resulting in an incorrect predictive index. When

apprised of their mistake, the officials recalculated the index. Neither the initial calculation nor the corrected result met the cut-off. Podberesky's remonstrations notwithstanding, this episode does not bespeak discrimination, but only an innocent (and harmless) mistake.

Finally, Podberesky offers statistics in an attempt to proceed under a disparate impact theory. Those statistics reveal that while Hispanics made up 4.2% of the class which entered UMCP in the fall of 1990, only 1.1% of the Key recipients from that class were Hispanic. Assuming that the statistics are accurate, they do not give rise to a cause of action under Title VI; that statute only reached intentional discrimination. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). Although in Guardians the Court did hold that regulations promulgated under Title VI can give rise to claims of disparate impact, see Alexander v. Choate, 469 U.S. 287, 292-94 (1985) (restating the holding of Guardians on this issue); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1044-45 (7th Cir. 1987), Podberesky has cited no regulations in his complaint or otherwise attempted to prove any regulatory disparate impact claim. Cf. Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 360 (S.D.N.Y. 1989). (Title IX plaintiff alleged violation of both statute and disparate impact regulations). Thus, his claim fails. Celotex Corp. v. Catrett, 477 U.S. 317, 322. (1986).

A separate order granting defendants' summary judgment motion is being entered herewith.

Date: May 15, 1991

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DANIEL J. PODBERESKY	*	
	*	
v.	*	Civil Action No.
	*	JFM-90-1685
WILLIAM E. KIRWAN,	*	
President of the	*	
University of Maryland	*	
at College Park,	*	
and the University of	*	
Maryland at College Park	*	

****

ORDER

For the reasons stated in the memorandum entered herein, it is this 15th day of May 1991

ORDERED

1. Defendants' motion for summary judgment is granted;

2. Plaintiff's motion for partial summary judgment is denied; and

3. Judgment is entered in favor of defendants against plaintiff.

J. Frederick Motz
United States District Judge

DECISION AND REPORT OF THE UNIVERSITY OF MARYLAND AT COLLEGE PARK REGARDING THE BENJAMIN BANNEKER SCHOLARSHIP PROGRAM

For the University of Maryland at College Park

William E. Kirwan
President

April 26, 1993

TABLE OF CONTENTS

SUMMARY OF FINDINGS AND CONCLUSIONS 156a

I. ORIGIN OF THIS ADMINISTRATIVE PROCESS 157a

A. A Student Challenges the Banneker Program 157a

B. Initiation of a Fact-Finding Process . 159a

II. THE UNIVERSITY HAS A HISTORY OF DISCRIMINATION AGAINST AFRICAN AMERICANS 162a

III. SIGNIFICANT PRESENT EFFECTS OF PAST DISCRIMINATION EXIST AT THE UNIVERSITY 164a

A. An Adverse Reputation Persists and is a Present Effect of Past Discrimination 164a

B. Perceptions of a Hostile Campus Climate Persist and are a Present Effect of Past Discrimination 167a

C. Underrepresentation of African Americans Persists and is a Present Effect of Past Discrimination 171a

(1) African Americans are Underrepresented when

Compared to the Pool of African American Students Qualified for Admission by High School Grade Point Average 175a

(2) African Americans are Underrepresented when Compared to the Pool of African American Students Qualified for Admission by Scholastic Aptitude Test Scores 176a

(3) Past Segregation is the Basis for Underrepresentation of African American Students . . 178a

(4) Underrepresentation of African Americans is a Present Effect of State Sanctioned Discrimination which Occurred Outside of the Institution 180a

D. Low Retention and Graduation Rates of African Americans Persist and are a Present Effect of Past Discrimination 183a

(1) Retention Rates of African American Students are Significantly Lower than those of Whites 184a

(a) Retention Rates are Lower for African Americans in Each Class 184a

(b) Retention Rates are Lower Each Year for African Americans in the Student Body as a Whole 186a

(c) Different Retention Rates Perpetuate the University as a White Institution 187a

(2) Graduation Rates of African American Students are Significantly Lower than those of Whites 189a

IV. THE UNIVERSITY HAS IMPLEMENTED A NUMBER OF PROGRAMS TO RECRUIT AND RETAIN MINORITY STUDENTS, AND TO IMPROVE THE CAMPUS REPUTATION AND CLIMATE. THESE PROGRAMS HAVE NOT REMEDIED THE PRESENT EFFECTS OF PAST DISCRIMINATION . 191a

V. THE BANNEKER PROGRAM IS EFFECTIVE TO REMEDY THE PRESENT EFFECTS OF PAST DISCRIMINATION 194a

A. The Banneker Program has Increased the Enrollment, Retention, and Graduation Rates of African American Students 195a

B. The Banneker Program has Increased the Number of Peer Mentors and Role Models Available to the African American Students 200a

C. The Banneker Program Successfully Challenges the Stereotype of African American Students as Under-Achievers 203a

VI. A NON-NEED, RACE-BASED PROGRAM IS NECESSARY TO RECRUIT BANNEKER PROFILE STUDENTS 206a

A. Banneker-Profile Students are not Recruited by Need-Based Scholarships 207a

B. The University's Experience with a Race-Neutral Merit Scholarship Shows that it Fails to Recruit Banneker-Profile Students 209a

VII. THE BANNEKER PROGRAM HAS A MINIMAL EFFECT ON NON-AFRICAN AMERICANS 210a

VIII. THE BANNEKER PROGRAM SHOULD BE MAINTAINED ONLY AS LONG AS NECESSARY TO REMEDY THE PRESENT EFFECTS OF PAST DISCRIMINATION 211a

IX. THE UNIVERSITY HAS A SPECIAL OBLIGATION TO ATTRACT AND RETAIN MORE AFRICAN AMERICAN STUDENTS IN ORDER TO ATTAIN DIVERSITY 213a

X. THE BANNEKER PROGRAM IS A VALUABLE AND APPROPRIATE TOOL TO AVOID OCR INTERVENTION 218a

CONCLUSION 220a

LIST OF EXHIBITS

Exhibit No.	Description of Exhibit
1	"In Re: Continuation of Benjamin Banneker Scholarship Program at the University of Maryland at College Park," February 1, 1992, submitted by the Office of the Attorney General of Maryland.
2	"Submission to the University of Maryland, College Park Regarding the Benjamin Banneker Scholarship Program," submitted on Behalf of Defendant-Intervenors Monica Greene, et al., in Podberesky v. Kirwan by NAACP Legal Defense Fund, et al.
3	Washington Legal Foundation Comments: Letters dated August 18, 1992; March 12, 1993; and March 25, 1993.
4	List of Parties Presenting Comments on the Banneker Program.
5	"Report of the Commission on Higher Education of Negroes to the Governor and Legislature of Maryland," January 15, 1937 (excerpts).
6	"The Benjamin Banneker Scholars

Program for High-Achieving African American Students at the University of Maryland--College Park: An Evaluation Study," by Dr. Walter R. Allen, Professor, Department of Sociology, University of California--Los Angeles (December 21, 1992).

7 "Black Students at the University of Maryland (College Park): The Views of Black Parents in Maryland," by Joe R. Feagin, Ph.D., Race Relations Consulting Services, Gainesville, FL (January 1993).

8 Affidavit of Marie S. Davidson, Executive Assistant to the President, University of Maryland at College Park.

9 Affidavit of Linda Clement, Director of Undergraduate Admissions, University of Maryland at College Park.

10 Affidavit of James N. Newton, Assistant to the Dean of the College of Engineering, University of Maryland at College Park.

11 Affidavit of Mary Cothran, Director, Office of Multi-Ethnic Student Education, University of Maryland at College Park.

12 Affidavit of Patricia Thomas-Walton, Assistant Director of Undergraduate Admissions, University of Maryland at College Park.

13 "Black in a White World: Black Students at the University of Maryland (College Park)," by Joe R. Feagin, Ph.D., Race Relations Consulting Services, Gainesville, FL (January 1993).

14 "Is the Banneker Scholars Program at the University of Maryland College Park Justified?," by Dr. James Blackwell, Professor Emeritus of Sociology, University of Massachusetts, Boston, MA (January 1993).

15 "Black Student Life at the University of Maryland at College Park," by William E. Sedlacek, Professor of Education, Assistant Director, Counseling Center, University of Maryland at College Park (December 14, 1992).

16 "The Middle States Periodic Review Report, the University of Maryland at College Park" (June 1992) (excerpts).

17 "Access Is Not Enough, A Report to the President Concerning

Opportunities for Blacks at the University of Maryland at College Park," by Ray Gillian, Assistant to the President
(October 18, 1989).

18 "A Diagnostic Study of the Racial Climate at University of Maryland College Park," by Jacqueline Fleming, Ph.D., Barnard College, Motivation Research Corporation (November 1992).

19 Transcript of March 4, 1993, Hearing held by President William E. Kirwan.

20 Affidavit of Dwight Patel, Student, University of Maryland at College Park.

21 "Black Enrollment Trends at UMCP, Fall 1970-Fall 1992."

22 "Graduates and Other Completers of Maryland Public High Schools by Race/Ethnicity: 1991-92," compiled by the Stat Board of Education.

23 "High School Program Completion, University of Maryland System Requirements," compiled by Maryland State Department of Education, Office of Management Information Systems.

24 "1991 Headcount Enrollment (FT & PT) 4 Year Public Institutions," compiled by the Maryland Higher Education Commission.

25 "High School Grade Point Average Study Comparing African Americans and Non-African Americans Enrolled as Freshmen at UMCP to all Maryland Origin High School Students with HSGPA of 2.0 or Greater."

26 "SAT (Math and Verbal) Study: Representation of African Americans in UMCP Freshman Class Compared to Pool of African Americans in Maryland with SAT (Math/Verbal) Scores of Enrolled UMCP Freshmen."

27 "SAT (Math and Verbal) Study: Representation of Non-African Americans in UMCP Freshman Class Compared to Pool of Non-African Americans in Maryland with SAT (Math/Verbal) Scores of Enrolled UMCP Freshmen."

28 Affidavit of Shaila R. Aery, Secretary of Higher Education for the State of Maryland.

29 "Report to the Governor and General Assembly," Maryland Commission

on Higher Education (1931).

30 "Report of State Board of Education Showing Condition of the Public Schools of Maryland for the Year Ending June 30, 1950."

31 Affidavit of Fred R. Sheheen, Commissioner of the South Carolina Commission on Higher Education.

32 "The Significance of the Banneker Scholarships for the Upward Occupational Mobility of Blacks in a Changing Economy," by R. Palmer (1992).

33 Affidavit of Steven Muller, President Emeritus of Johns Hopkins University.

34 "The Basic Report of the Committee on Excellence through Diversity: Providing Opportunities for Black Americans at College Park," July 30, 1992.

35 "Retention History of Five Cohorts: 1974, 1978, 1982, 1986, 1989."

36 "Retention and Graduation Rates University of Maryland at College Park, First-time, Full-time Freshmen Entering 1974-1981," compiled by Office of Institutional Studies.

37 "Retention and Graduation Rates, University of Maryland College Park, First-time, Full-time Freshmen Entering 1982-1991," compiled by Office of Institutional Studies.

38 "Percent of Students Leaving Before Senior Year."

39 "Percent of Enrolled Students (All Cohorts) Leaving During an Academic Year Without Graduating 1978-1992."

40 "Total Losses, African American and White Students, All Cohorts, in an Academic Year 1978-1991."

41 "Percent of Students Graduating by Completion of Fifth Year, 1974 to 1987."

42 "The Minority Achievement Plan of the University of Maryland at College Park," September 1991.

43 "A Descriptive Study Comparing Recipients of the Benjamin Banneker Scholarship with Non-Recipients for Cohorts of Students Entering the University of Maryland Beginning 1974 and Detailing Enrollment and Degree Attainment," by William T. Trent, Professor of Educational Policy Studies, University of Illinois

(January 1993).

44 "Mean High School Grade Point Averages and SAT Scores: Banneker Freshmen Compared to All African American Freshmen."

45 "SAT Results: Maryland High School Seniors, Trends in SAT Scores by Race 1979-1989."

46 Affidavit of Ray Gillian, Assistant to the President, University of Maryland at College Park.

47 Affidavit of Raymond Johnson, Professor of Mathematics, University of Maryland at College Park.

48 Affidavit of Allison George, Banneker Scholar, University of Maryland at College Park.

49 Affidavit of William J. Higgins, Associate Dean of the College of Life Sciences, University of Maryland at College Park.

50 Affidavit of Carl Cohen, Professor of Philosophy, University of Michigan.

51 Affidavit of Andrea L. Dennis, Banneker Scholar, University of Maryland at College Park.

52 Affidavit of Richard A. Dalgetty, Banneker Scholar, University of Maryland at College Park.

53 Affidavit of Edwin Howard Smead, Lecturer, Honors Program, University of Maryland at College Park.

54 Affidavit of Jane Lawrence, Acting Director, Honors Program, University of Maryland at College Park.

55 Affidavit of Joshua C. Morganstein, Student and Resident Assistant, University of Maryland at College Park.

56 "Average SAT Scores and High School Grade Point Averages for Non-African American Freshmen Compared to African American Freshmen 1987 to 1992."

57 "Numbers of African American Students with Average Banneker SAT Scores Compared to Numbers of Non-African Americans Students with Average Banneker SAT Scores."

58 "Numbers of African American Students with Average Banneker High School Grade Point Averages

Compared to Numbers of Non-African American Students with Average Banneker High School Grade Point Averages."

59 Affidavit of Ulysses Glee, Director of the Office of Student Financial Aid, University of Maryland at College Park.

60 "Financial Need of Banneker Recipients 1990-1992."

61 "Francis Scott Key Awards 1987-1992."

62 "Types of Financial Aid Awarded for the Fiscal Years 1988-1992."

63 "1979 to Present, Banneker Scholarship Summary."

64 "University of Maryland at College Park Mission Statement," approved by the Maryland Higher Education Commission on February 13, 1990.

65 "The Value of Diversity in Higher Education," by Goodwin Liu (September 1992), submitted by the American Council on Education.

66 Affidavit of Donna E. Shalala, Secretary of the Department of Health and Human Services.

67	Affidavit of Sheldon Hackney, President of the University of Pennsylvania.
68	Affidavit of William H. Danforth, Chancellor of Washington University.
69	"An Analysis of the Role of the Office for Civil Rights in the Enforcement of Civil Rights in Higher Education in Maryland," by Robert A. Dentler, December 1992.

DECISION AND REPORT OF THE UNIVERSITY OF MARYLAND AT COLLEGE PARK REGARDING THE BENJAMIN BANNEKER SCHOLARSHIP PROGRAM

SUMMARY OF FINDINGS AND CONCLUSIONS

In response to the decision of the United States Court of Appeals for the Fourth Circuit in Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992), the University of Maryland at College Park initiated an administrative proceeding regarding the continuation of the Benjamin Banneker Scholarship Program, a program providing four-year scholarships to high achieving African American high school students. The University of Maryland at College Park, through its President, William E. Kirwan, concludes that effects of past discrimination against African Americans in Maryland still exist in the form of an adverse reputation among members of the African American community; perceptions of a hostile campus climate; and in low enrollment, retention and graduation rates for African American students at the University. If left unremedied, these effects will build upon and exacerbate each other, perpetuating the University's image within the African American community as a White institution too little changed from the days of segregation, with a campus atmosphere perceived by many African Americans as unwelcoming.

The University has adopted many programs to remedy these lingering effects. While no single program

can possibly remedy them all, the Banneker Scholarship Program has proven highly effective in addressing some of the most persistent effects of past discrimination.

Based on the arguments and evidence presented, the University finds that effects of past discrimination currently exist at the University which justify the continuation of the Banneker Program. In addition, the Banneker Program is an essential and appropriately limited measure to attain and maintain a diverse student population at the University's College Park campus.

I. ORIGIN OF THIS ADMINISTRATIVE PROCESS.

A. A Student Challenges the Banneker Program.

The genesis of this administrative proceeding can be traced to June 22, 1990, when Daniel J. Podberesky, then a freshman at the University of Maryland at College Park, challenged the University's Benjamin Banneker Scholarship Program in a suit filed in the United States District Court for the District of Maryland. Mr. Podberesky sought and obtained admission to the University and applied for the merit-based scholarships available at the University. He was not awarded a Key scholarship[1] and was not considered for the Banneker scholarship because he is not African American. Following his enrollment, he sought to enjoin continuation of the Banneker Scholarship Program and requested compensatory relief, in the form of an award of

---

[1]The Francis Scott Key Scholarship is a merit-based, race-neutral scholarship.

a scholarship, under the civil rights laws.

On May 15, 1991, the federal District Court ruled that the existence and continuation of the Banneker Program did not violate the law because the Banneker Program serves a compelling governmental interest.[2] To support its conclusion, the District Court relied on evidence demonstrating that the Banneker Program was created as a partial response to litigation between the Office for Civil Rights of the U.S. Department of Education ("OCR") and the University, in which OCR asserted that the State of Maryland and the University were not operating in compliance with Title VI of the Civil Rights Act of 1964.

The United States Court of Appeals for the Fourth Circuit reversed the District Court's decision following an appeal by Mr. Podberesky.[3] The Court of Appeals held the lower court erred when it "failed to make a specific finding" of "some present effect of past discrimination." The appellate court concluded that the District Court's finding, "that it would be prudent to keep the race-exclusive scholarship in place at least until OCR concluded its investigation of UMCP," was not sufficient to satisfy the applicable constitutional standards. Accordingly, the case was remanded to the District Court for a determination "as to the present effects of past discrimination at the University."[4]

---

[2]See Podberesky v. Kirwan, 746 F. Supp. 364 (D. Md. 1991).

[3]Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992).

[4]Id. at 57.

B. Initiation of a Fact-Finding Process.

In light of the appellate court decision, the University decided to initiate its own inquiry to determine whether to continue the Benjamin Banneker Scholarship Program. On August 21, 1992, the University issued a notice in the Maryland Register requesting written comments concerning the continuation of the Banneker Program:

UNIVERSITY OF MARYLAND AT COLLEGE PARK
Continuation of Blacks-Only Scholarship Program

> The University of Maryland at College Park is presently gathering and reviewing all information necessary to assist the University in determining whether to continue the Benjamin Banneker Scholarship Program, which offers four-year full financial scholarships to high achieving black high school students. The Banneker Program was originally adopted as part of the State's efforts to remedy the effects of past discrimination in compliance with the federal Department of Education's determination that the State had not fully dismantled its formerly segregated public higher education system. The University now seeks to determine whether present effects of past discrimination exist at the University which justify the continuation of the Banneker Program, and also whether that Program, regardless of the reasons that

> led to its creation, should be continued as a means of attaining a diverse student population at the University's College Park campus.
>
> Written comments concerning the continuation of the Banneker Program should be submitted on or before October 16, 1992 to the University c/o John Anderson, Assistant Attorney General, Office of the Attorney General, 200 St. Paul Place, Baltimore, Maryland 21202. Following the submission of those comments and evidentiary materials offered by the parties in Podberesky v. Kirwan, the University will issue a final administrative decision.[5]

In addition to providing notice in the Maryland Register, the University notified the parties in the federal court litigation of the opportunity to present evidence.

Under State law, the President of the University of Maryland at College Park is its chief executive officer.[6] To assist with the fact-finding process, the President assembled an Advisory Group, consisting of James Lesher, Professor of Philosophy and Assistant to the President; Cordell W. Black, Assistant Vice President for

---

[5]Maryland Register, Vol. 19, Issue 17 (Friday, Aug. 21, 1992).

[6]See §12-109 of the Education Article of the Maryland Annotated Code (1992 Replacement Volume).

Academic Affairs; Susan Bayly, University Counsel; and Adam Yarmolinsky, Provost and Vice President for Academic Affairs, University of Maryland Baltimore County. In addition, the Office of the Attorney General for the State of Maryland made two Assistant Attorneys General available to provide advice and assistance during the course of the proceedings.

The University selected individuals to present the case before the decisionmaker. The University selected Dr. Marie S. Davidson, represented by Evelyn O. Cannon, Andrew H. Baida, and Richard A. Weitzner of the Office of the Attorney General. At all times during the course of the proceedings, the President and members of his Advisory Group were screened from the members of the University responsible for presenting the case. The same was true at the Office of the Attorney General.

Written submissions were presented to the University by the parties to the litigation: the Office of the Attorney General,[7] the NAACP Legal Defense and Education Fund, Inc., et al.,[8] and the Washington Legal

---

[7]Exhibit 1, In Re: Continuation of Benjamin Banneker Scholarship Program at the University of Maryland at College Park, February 1, 1993, submitted by the Attorney General of Maryland ("Attorney General Memorandum").

[8]Exhibit 2, Submission to the University of Maryland College Park Regarding the Benjamin Banneker Scholarship Program, submitted on behalf of Defendant-Intervenors Monica Greene, et al., in Podberesky v. Kirwan, ("NAACP Memorandum").

Foundation.[9] A list of others who submitted comments about the Banneker Program is attached to this Report.[10]

The University scheduled a hearing and invited the parties who made written submissions to give an oral presentation and to answer questions posed by the President and his Advisory Group. This hearing was held on March 4, 1993. The Washington Legal Foundation, the Office of the Attorney General, and the NAACP Legal Defense & Education Fund, Inc., participated in the hearing.

II. THE UNIVERSITY HAS A HISTORY OF DISCRIMINATION AGAINST AFRICAN AMERICANS.

Maryland's geographic position as the boundary between the slave and free states finds expression in its history of discrimination against African Americans. It was a slave state that remained in the Union during the Civil War; it had the largest number of free African Americans of any state at the beginning of the Civil War. In 1934 one arm of the State denied Donald Murray admission to the University of Maryland Law School because he was African American; another arm of the State, the State courts, ordered him admitted to the school. As detailed in comprehensive histories of the

---

[9]Exhibit 3, Washington Legal Foundation Comments: Letters dated August 18, 1992; March 12, 1993; and March 25, 1993.

[10]Exhibit 4, List of Parties Presenting Comments on the Banneker Program.

State, the history of discrimination in Maryland has chapters of struggle against discrimination which are a source of pride, as well as chapters which reflect Maryland's heritage as a slave and border state.[11]

One undeniable manifestation of discrimination was the intentional exclusion of African Americans from the State's best institutions of higher education, including the University.[12] It was not until 1954, when the Supreme Court decided Brown v. Board of Education, that the Board of Regents of the University of Maryland voted to admit students to all of its campuses without regard to race.[13]

Unfortunately, the end of de jure segregation did not bring with it the end of discrimination. The University left in place a system that was at best neglectful, and at worst hostile. It was not until the mid-1970s that the University began to take significant

---

[11]See, e.g., M. Callcott, The Negro in Maryland Politics, 1870-1912 (Baltimore, Johns Hopkins University Press, 1969); R. Brugger, Maryland, A Middle Temperament, 1634-1980 (Baltimore, Johns Hopkins University Press 1988); B. Fields, Slavery and Freedom on the Middle Ground: Maryland During the Nineteenth Century (New Haven, Yale University Press, 1985).

[12]See generally, Exhibit 5, The Report of the Commission on Higher Education of Negroes to the Governor and the General Assembly of Maryland (1937) (excerpts describing a dual but unequal system of higher education).

[13]George H. Callcott, A History of the University of Maryland at 353 (Baltimore, Maryland Historical Society, 1966).

effective steps to remedy this situation.[14]

III. SIGNIFICANT PRESENT EFFECTS OF PAST DISCRIMINATION EXIST AT THE UNIVERSITY.

A. An Adverse Reputation Persists and is a Present Effect of Past Discrimination.

The University's historical exclusion of African Americans earned it a reputation for discrimination that has discouraged and still discourages African Americans from considering the institution as an option for higher education. Students' college choices are influenced by family, friends, and others.[15] "What prospective students think about a school, how attractive they find it, is very much influenced by what they 'hear' about the school."[16] A recent study of applicants admitted to the University but who chose not to attend reveals that their choice was influenced by the University's image.[17] Even those African American students who elected to

---

[14]Exhibit 1, supra, Attorney General Memorandum at 13-23; Exhibit 2, supra, NAACP Memorandum at 10-35.

[15]Exhibit 6, The Benjamin Banneker Scholars Program for High-Achieving African American Students at the University of Maryland--College Park: An Evaluation Study by Dr. Walter R. Allen, Professor, Department of Sociology, University of California--Los Angeles (December 21, 1992), at 30 ("Allen Report").

[16]Id.

[17]Id. at 38-39, citing N. Young, A Survey of Factors Influencing College Choice of Non-enrolled Applicants at the University of Maryland-College Park (1985).

attend the University had to overcome the University's reputation as an all-White university.[18] Over one third of Banneker scholars were aware of this reputation.[19] Participants in this proceeding submitted ample and persuasive evidence that the African American community perceives the University as continuing to be a White institution, too little changed since the days of segregation, and one that can still present an unwelcoming environment for African Americans.

The evidence presented shows the University has an adverse reputation among parents, guidance counselors, students, and some others in the African American community. The exclusion of African Americans occurred within the lifetime of those now in a position to influence prospective students. Among these, the memories of a "confederate tradition" that excluded African Americans is still alive.[20] Many parents of the children the University now seeks to enroll were themselves victims of discrimination that excluded them from the University. "The result is to leave an ambivalence, if not bitterness, toward the University among blacks."[21] Over 80% of parents interviewed in a study by Dr. Joe E. Faegin reported that the reputation

---

[18]Id. at 34.

[19]Id. at 22.

[20]Id. at 39, 137.

[21]Id. at 39-40.

of the University is mostly or somewhat negative.[22] Not a single parent chose to describe the University as having a mostly positive reputation.[23] The majority, over 75%, agreed that historically the University has failed to serve the African American community and students.[24] These parents still remember the State-sanctioned exclusion by the University. Moreover, the parents generally are not aware of the strides the University has made in recent years. Only 17% believed that the reputation of the University had changed in a positive direction over the last five years.[25] This adverse reputation also extends to guidance counselors at high schools with significant numbers of African American students.[26] Although

---

[22]Exhibit 7, Black Students at the University of Maryland (College Park): The Views of Black Parents in Maryland, by Joe R. Feagin, Ph.D., Race Relations Consulting Services, Gainesville, FL. (January 1993) at 7 ("Feagin Parent Report").

[23]Id.

[24]Id. at 14-15.

[25]Id. at 8.

[26]Exhibit 8, Affidavit of Dr. Marie S. Davidson, Executive Assistant to the President at ¶11 ("Davidson Aff."); Exhibit 9, Affidavit of Dr. Linda Clement, Director of Undergraduate Admissions at ¶33 ("Clement Aff."); Exhibit 10, Affidavit of Dr. James N. Newton, Assistant to the Dean of the College of Engineering at ¶8 ("Newton Aff."); Exhibit 11, Affidavit of Dr. Mary Cothran, Director, Office of Multi-Ethnic Student Education at ¶¶7, 13 ("Cothran Aff."); Exhibit 12, Affidavit of Dr. Patricia Thomas-Walton, Assistant Director of Undergraduate Admissions, at ¶¶7-9 ("Walton

guidance counselors are not responsible for attendance decisions, their views can present an additional obstacle for the University because they can shape choices as they channel information to students and parents.[27] As a result, 70% of the students canvassed in a second study by Dr. Faegin reported that the reputation of the University within the African American community was mostly or somewhat negative.[28]

The University has made efforts to distance itself from its past and taken measures to improve its reputation in the African American community. Despite these efforts, the University continues to have an adverse reputation within the African American community as a result of past discrimination.

B. Perceptions of a Hostile Campus Climate Persist and are a Present Effect of Past Discrimination.

Pervasive discrimination has had a lasting effect on the beliefs and attitudes of the citizens of Maryland. This effect has been variously described in the studies and literature submitted in this inquiry. On the national scene, Andrew Hacker writes of an "organizational culture" that presumes African Americans are incapable

---

Aff.").

[27]Exhibit 6, supra, Allen at 30.

[28]Exhibit 13, Black in a White World: Black Students at the University of Maryland (College Park) by Joe R. Feagin, Ph.D., Race Relations Consulting Services, Gainesville, FL. (January 1993) at page 7 ("Feagin Student Report.")

of meeting its standards and operates on a foundation of White superiority.[29] With respect to the University, Professor James Blackwell describes these beliefs and attitudes as the "stigma of black inferiority," arising from "entrenched patterns of socialization and institutionalized segregation and discrimination."[30] The Faegin Student Report refers to this effect as the legacy of a recalcitrant "Jim Crow" system, sustained by patterns of informal segregation, where private prejudice and discrimination are allowed to persist.[31] A more detailed grouping of negative attitudes towards African Americans by Whites, and African Americans' perception of and adjustment to these attitudes is described in a report by Dr. William Sedlacek.[32] The expressions of individual prejudices by the members of a university community ultimately have an impact on perceptions of institutional racism.[33]

---

[29]A. Hacker, Two Nations: Black and White, Separate, Hostile, Unequal, (New York, Charles Scribner's Sons, 1992).

[30]Exhibit 14, Is the Banneker Scholars Program at the University of Maryland College Park Justified?, by Dr. James Blackwell, Professor Emeritus of Sociology, University of Massachusetts, Boston, MA (January 1993) at 12-13 ("Blackwell Report").

[31]Exhibit 13, supra, Faegin Student Report at 1.

[32]Exhibit 15, Black Student Life at the University of Maryland at College Park, by Dr. William E. Sedlacek, Professor of Education, Assistant Director, Counseling Center, University of Maryland at College Park (December 14, 1992) at 16-22 ("Sedlacek Report").

[33]Id. at 10.

The University is particularly susceptible to the harmful effects of individual prejudice on the enrollment, retention, and graduation of African American students. Actions of individuals which may be ignored as aberrational in other settings become linked with the University's history. Several studies conducted prior to and in connection with this inquiry show a segment of African American faculty and students at the University believes the organizational culture is hostile to African Americans.[34]

The Washington Legal Foundation asserts that the University need not address the atmosphere of discomfort and racial tension, so long as there is no overt second-class treatment of African Americans.[35] But the University cannot be concerned solely with outright "second-class treatment" of African Americans. Because the University has been diligent in prosecuting such illegal conduct, there ought to be few reports of illegal

---

[34]Exhibit 14, supra, Blackwell at 20-25. See also, Exhibit 16, The Middle States Periodic Review Report, the University of Maryland at College Park, June 1992, (excerpts) at 54; Exhibit 17, Access is Not Enough, A Report to the President Concerning Opportunities for Blacks at the University of Maryland at College Park, by Ray Gillian, Assistant to the President (October 18, 1989), at 12-16, 25-27; Exhibit 18, A Diagnostic Study of the Racial Climate at University of Maryland College Park, by Jacqueline Fleming, Ph.D., Barnard College, Motivation Research Corporation (November 1992) at 11-20.

[35]See Exhibit 19, Transcript of March 4, 1993, Hearing held by President William E. Kirwan at 10, 23-26 ("March 4, 1993, Hearing"). See also Exhibit 20, Affidavit of Dwight Patel.

discrimination. Both the Patel Survey[36] and the research conducted by Olchak Market Research and Dr. Faegin confirm this expectation. Few students report that they have been mistreated by White professors at College Park because of race.[37] Yet the University's climate is not shaped solely by outright acts of discrimination; rather it emerges from the composite of stereotypes, attitudes, and behavior of community members. For this reason, any inquiry that seeks to ascertain the campus climate cannot equate the general climate with overt acts of discrimination. The WLF's Patel Survey, unlike the other available studies, confuses these two aspects. For example, instead of asking the students for their perceptions of the campus climate, the survey asked African American students whether the University "is a racist institution where blacks receive second-class treatment."[38] Even the WLF's inquiry, which identifies discrimination as second class treatment, revealed that one third of the African American students agree to some extent that the University is a racist institution.[39] Other studies reveal an overwhelming majority of African American students report a negative racial climate on

---

[36]At the WLF's request, Mr. Patel conducted a survey of 15 White and 15 African American students who walked by him while he was standing in front of the University's Stamp Student Union. The survey asked questions about race relations at the University ("Patel Survey").

[37]Exhibit 13, supra, Faegin Student Report at 23-24; Exhibit 20, supra, Patel Survey at 4, question 6.

[38]Exhibit 20, supra, Patel Survey at 4, question 7.

[39]Id.

campus.[40] The WLF misses the significance of its findings. Manifestations of hostile attitudes and beliefs need not be extensive for them to have widespread influence at the University.

The University cannot ignore its own past and the past discriminatory practices of the State. Past discrimination has resulted in attitudes among some members of the campus community that adversely affect recruitment, retention, and graduation of African American students. This is unacceptable. It requires the University to take corrective action to fulfill its educational responsibility to all qualified persons in the State.

C. Underrepresentation of African Americans Persists and is a Present Effect of Past Discrimination.

One major effect of the State's past exclusionary practices is the underrepresentation of African Americans at the University. Qualified African American high school students in Maryland are not represented in the University's entering classes to the extent that their availability would otherwise predict. Because the University draws its students from the statewide pool of students eligible for college and because the traits it seeks in its students -- commitment, motivation, special talents, character and achievement -- do not correlate to race, the University expects that the racial composition of its

---

[40] E.g., Exhibit 13, supra, Faegin Student Report at 10-12 (89% of students in focus groups either tended to disagree or strongly disagreed with the statement that "today the University of Maryland at College Park is a college campus where black students are generally welcomed and nurtured.")

student body will reflect the racial composition of qualified college-eligible high school graduates. The University fails, however, to meet this expectation with respect to African Americans, the one group that has been historically excluded at the University.

Unchallenged historical and statistical evidence reveals a pattern of continuous and uninterrupted underrepresentation originating with the State's exclusionary practices and continuing to the present time. Prior to 1954, there were virtually no African American students on campus. The end of de jure segregation produced no visible changes. As late as 1969, fifteen years after Brown was decided, fewer than 1% of the students at the University were African American.[41] In 1970, 3.4% of the University's full-time undergraduate students were African American; in 1975, 6.8%; in 1980, 7.5%; in 1985, 8.6%; in 1990, 11.2%.[42]

Although the percentages of enrolled African American undergraduates have gradually and steadily increased since 1954, estimates of the population of African American high school graduates in Maryland who are potentially admissible to the University disclose that African Americans continue to be significantly underrepresented in the enrolled freshman classes. Approximately one quarter of all graduating high school seniors in Maryland are African American. In 1991-1992, for example, they represented 27.1% of the

---

[41]Exhibit 8, supra, Davidson Aff. at ¶5.

[42]Exhibit 21, Black Enrollment Trends at UMCP, Fall 1970-Fall 1992.

graduates.[43] In the same 1991-1992 period, 22% of the students taking the Scholastic Aptitude Test in Maryland were African American.[44] Similarly, in 1991, among all high school students who graduated with a course curriculum meeting the University's admission requirements, 17.9% were African American.[45] More broadly, looking at the total undergraduate population attending four year public colleges and universities, 20.3% were African American.[46] Yet at the same time, 11.2% of the University's undergraduate student body were African American.[47]

In making its admissions decisions, the University seeks out those students with the greatest promise of success. Because the characteristics the University seeks in its students cannot be quantified, each application must be, and is, evaluated individually. There is no Scholastic Aptitude Test ("SAT") score, American College Test ("ACT") score, or a particular high school grade point

---

[43]Exhibit 22, Graduates and Other Completers of Maryland Public High Schools by Race/Ethnicity: 1991-92, compiled by the State Department of Education.

[44]Exhibit 9, supra, Clement Aff., ¶19.

[45]Exhibit 23, High School Program Completion, University of Maryland System Requirements, compiled by the Maryland State Department of Education, Office of Management Information Systems.

[46]Exhibit 24, 1991 Headcount Enrollment Four Year Public Institutions, compiled by the Maryland Higher Education Commission.

[47]Exhibit 21, supra, Black Enrollment Trends at UMCP, Fall 1970-Fall 1992.

average (or matrix of the two) that precludes admission to the University. While it is tempting to resort to some numerical threshold -- for example, a standardized test score or a grade point average -- as a surrogate for qualifications, the University's experience with the "individual review" approach is that mere numbers, without an examination of a student's total history, are not reliable predictors of success at College Park. The SAT score, for example, is not correlated strongly to long-term performance; it tells little about academic achievement after the freshman year. Moreover, an excessive reliance on the SAT can lead to a disparate negative impact on African Americans.[48] High school grade point averages ("HSGPA") have also proven to be misleading in assessment of success.[49] Allowing them to dictate admissions decisions would unnecessarily exclude many individuals and categories of applicants who would otherwise be reasonably predicted to succeed. For example, low HSGPAs are poor indicators of college achievement for persons who temporarily interrupt their education after high school.

Ultimately, therefore, the standard for admission to the University of Maryland at College Park is a reasonable probability of academic success at this institution. The potential population of persons qualified for admission are all those whose individual circumstances predict a reasonable likelihood of completing the curriculum and achieving a degree. These

---

[48]Exhibit 15, supra, Sedlacek at 11-12.

[49]See e.g., Tracey, T. J. and Sedlacek, W. E., (1989). Noncognitive Indicators of Student Success. The Journal of College Admissions; 1, 2-9, and studies cited therein.

circumstances are found in all racial and ethnic groups. With so many actual non-quantifiable factors in the calculus of admission, any attempt to define the pool of potential students in terms of a single characteristic will necessarily underestimate the overall numbers.

Nevertheless, such estimates are instructive. An analysis of the potentially qualified pool of Maryland high school students using two variables in the admissions decision, SAT scores and HSGPAs, leads to the conclusion that African American students are substantially underrepresented in the University's freshman classes.

(1) African Americans are Underrepresented when Compared to the Pool of African American Students Qualified for Admission by High School Grade Point Average.

This approach defines the population of admissible students as all high school students who graduated in Maryland in a particular year with a HSGPA equal to or better than 2.0 ("C"). The percentage of African American students in this population is then compared to their respective percentage in the enrolling first-time University freshman class that year. Because the State-wide HSGPA information comes from a self-reporting "Student Descriptive Questionnaire" completed by students taking the SAT, the data do not report all high school students, but only those most likely to apply to college. The available data permitted an examination of the last six academic years, 1987 through 1992. The

results are tabulated in Exhibit 25.[50]

The results of the HSGPA study for the most recent year present a picture recurring through the study. In 1992, African Americans represented 21.1% of all high school students, State-wide, graduating with a 2.0 ("C") GPA, or better. However, African Americans comprised only 10.8% of the enrolled freshman class in 1992.[51] Potentially qualified college-bound African American high school students were underrepresented in the entering class compared to their estimated availability in Maryland. In contrast, non-African American high school students were represented in the freshman class in a percentage greater than their availability in the Maryland pool would predict -- 89.2% enrolled compared to 78.9% available.[52]

(2) African Americans are Underrepresented when Compared to the Pool of African American Students Qualified for Admission by Scholastic Aptitude Test Scores.

This approach defines the population of admissible students as all students who took the SAT in Maryland in a particular year and achieved a result equal to, or better

---

[50]Exhibit 25, HSGPA Study Comparing African Americans and Non-African Americans Enrolled as Freshmen to All Maryland Origin High School Students with HSGPA of 2.0 or Greater.

[51]Id.

[52]Id.

than, the lowest percentile SAT score of all freshmen enrolled that year at the University. The percentages of African Americans in this pool are then compared to their respective percentages in the enrolling first-time freshman class. The available data permitted an examination of the last six academic years, 1987 through 1992. The results are tabulated in Exhibit 26.[53]

Like the HSGPA study, the results of the most recent year present a picture recurring through the study. In 1992, the lowest SAT scale score of admitted freshmen at the University was Math: 380, Verbal: 270. Among all the high school students in Maryland who took the SAT that year and achieved an equal or better Math score, 14.6% were African American. Among all who achieved an equal or better Verbal score, 18.5% were African American. The enrolled University freshman class in 1992, however, was only 10.8% African American. Potentially qualified African American high school students were substantially underrepresented in the entering class compared to their estimated availability in Maryland. In contrast, non-African American high school students were represented in the freshman class in a percentage greater than their estimated availability in the Maryland pool would predict -- 89.2% were enrolled compared to an available pool of 85.4% (Math) and

---

[53]Exhibit 26, SAT (Math and Verbal) Study: Representation of African Americans in UMCP Freshman Class Compared to Pool of African Americans in Maryland with SAT (Math/Verbal) Scores of Enrolled UMCP Freshmen.

81.5% (Verbal).[54] Again, as in the HSGPA study, disparities exist between African American and non-African American high school students in their respective ratios of State-wide availability and University enrollment based on SAT scores.

Parallel studies of availability and enrollment using two major variables, SAT scores and HSGPAs, both indicate that African American students enroll at the University in numbers substantially less than their availability in Maryland would predict. Accordingly, the University concludes African Americans are underrepresented on this campus.

(3) Past Segregation is the Basis for Underrepresentation of African American Students.

All participants in these proceedings conclude that underrepresentation can be an effect of past discrimination. The Washington Legal Foundation, which otherwise opposes the continuation of the Banneker Scholarship Program, agreed in response to questions that the University could legitimately address underrepresentation in the years immediately following Brown v. Board of Education through race-exclusive scholarships.[55] The WLF contends, however, that at

---

[54]Exhibit 27, SAT (Math and Verbal) Study: Representation of Non-African Americans in UMCP Freshman Class Compared to Pool of Non-African Americans in Maryland with SAT (Math/Verbal) Scores of Enrolled UMCP Freshmen.

[55]Exhibit 19, supra, March 4, 1993, Hearing at 36-38.

some point in time the past effects can no longer be assumed to be continuing, so that statistical evidence that the University is a predominantly White institution may not be considered as even partial evidence of the presence of continuing effects.[56]

The WLF suggests that the University should look to the racial composition of the student body at other peer institutions, such as the University of Illinois, to determine the appropriate target measure for this campus.[57] In effect, the argument is that if only 15% of the students at peer institutions across the country are African American, then it follows that 15% must be the percentage of African Americans qualified to enroll at the University.

This is not a viable approach to the issue. First, the comparison of the University's racial composition with that of other institutions is meaningless unless it takes into account those universities' own circumstances. Thus, another university's own history of past or current discrimination, as to which the University can reach no conclusion due to the lack of evidence, or the composition of its state population may well affect the composition of its student body. Nor would the absence of de jure segregation in a state establish the absence of discrimination. Because discrimination has permeated the entirety of this nation's history, and because the manifestations of discrimination are so varied, the absence of de jure segregation by itself says nothing about the

---

[56]Id. at 38-39.

[57]Exhibit 19, supra, March 4, 1993, Hearing at 9-10.

presence or absence of discrimination.[58] To target a specific racial composition that reflected the effects of discrimination elsewhere would perpetuate, rather than remedy, the invidious effects of discrimination.

Neither the WLF nor any other party offered evidence of any event or factors intervening since segregation with a causal connection to underrepresentation. This underrepresentation began with segregation. It has continued to the present time. Absent evidence of a significant and demonstrable intervening factor, the University's conclusion is that past segregation remains causally tied to the observed group differences. Indeed, the evidence presented, and the experience of the University's administration confirm that the University's past history of discrimination still poses an impediment to African Americans attending the University.

(4) Underrepresentation of African Americans is a Present Effect of State Sanctioned Discrimination which Occurred Outside of the Institution.

It is also important in this discussion of underrepresentation in enrollment to address the WLF's belief that if the University finds past discriminatory acts which occurred outside the campus now contribute to the current underrepresentation of African American students on campus, it has no legitimate interest in seeking to rectify the imbalance in the racial composition of its student body. First, as the evidence detailed above demonstrates, past discrimination on campus has resulted

---

[58]See, e.g., A. Hacker, supra.

in the underrepresentation existing today. Second, the State of Maryland has an interest, codified in State law, in developing a program of desegregation and equal educational opportunity.[59] To fulfill its obligations under State and federal law, Maryland developed system-wide plans to ensure equal educational opportunities for all its citizens.[60] One of the principal objectives of these plans is to achieve the continued integration of Maryland's historically White colleges and universities.[61] As an historically White institution that discriminated against African Americans, the University bears a responsibility to act as the State's agent in achieving integration and providing equal educational opportunities.[62] To the extent that State-sanctioned discrimination has present effects, the University as a State institution may address the effects of such discrimination.

The effects of past discrimination against African Americans in education, resulting in the underrepresentation detailed above, is visited upon the current generation of high school graduates in two ways.

---

[59]See generally, Exhibit 28, Affidavit of Shaila R. Aery, Secretary of Higher Education for the State of Maryland ("Aery Affidavit").

[60]Id.

[61]Id. at ¶26.

[62]E.g., Exhibit 5, supra; Exhibit 29, Report to the Governor and General Assembly, Maryland Commission on Higher Education, (1931); Exhibit 30, Report of State Board of Education Showing Condition of the Public Schools of Maryland for the Year Ending June 30, 1950.

First, it limits the aspirations of children who grow up in homes of parents who did not have the opportunity to attend college. Educational research indicates that one of the greatest factors that motivates young people of any race to attend college is whether their parents attended college.[63]

In addition, past discrimination against African Americans in education has contributed to a disparity in the household income of African Americans in Maryland as compared to Whites.[64] The resulting inequalities in family income have a disproportionate effect on the ability of African American parents to pay for college.[65] As a result, decisions of African American students regarding choice of a college or university are influenced by the amount and type of available aid. Research on the empirical effects of financial aid on different racial populations shows financial aid is rated at or near the top among factors most important to the recruitment and

---

[63]Exhibit 31, Affidavit of Fred R. Sheheen, Commissioner of the South Carolina Commission on Higher Education, at ¶10.

[64]Exhibit 32, R. Palmer, The Significance of the Banneker Scholarships for the Upward Occupational Mobility of Blacks in a Changing Economy (1992) (finding that, in Maryland, the median household income of African Americans is only 70% that of Whites, and that much of this income inequality can be attributed to inequality of educational attainment beyond high school).

[65]Exhibit 33, Affidavit of Dr. Steven Muller, President Emeritus of the Johns Hopkins University at ¶8 ("Muller Affidavit").

retention of African American students.[66] Surveys of University students confirm that the availability of financial aid concerns larger numbers of African American students than White students.[67]

Disparities in the income and education of parents of African American students are directly tied to past discrimination in the State's educational system. That discrimination, while it occurred in part outside of this campus, has current adverse effects here in the form of underrepresentation.

D. Low Retention and Graduation Rates of African Americans Persist and are a Present Effect of Past Discrimination.

The University did not undertake to educate African American citizens in Maryland until 1954. Although the legal impediments to the admission of African Americans have been removed, the University has been unable to fulfill its responsibility to educate this group. African American students have a significantly lower retention rate at the University than their peers. Similarly, they graduate in numbers proportionately lower than other students. These low retention and graduation rates have been observed as long as the University has maintained data. These observed group differences result from past discrimination. The University enrolls fewer African Americans than would be expected absent past

---

[66]Exhibit 34, The Basic Report of the Committee on Excellence through Diversity: Providing Opportunities for Black Americans at College Park, July 30, 1992, at 105.

[67]Id. at 105-106.

discrimination. In addition, individual instances of bias and the perception of a racially hostile environment among some African American students discourages and distracts African American students from completing their education and obtaining a degree. Therefore, the University necessarily graduates fewer African Americans as a result of its history of discrimination.

(1) Retention Rates of African American Students are Significantly Lower than those of Whites.

The difference in retention between African American and non-African American students at the University is dramatic. Historically, the extent of the differential -- the percent by which African American students are less likely to remain at the University -- has never diminished significantly. This disparity is particularly marked between African Americans and their White classmates, the historical majority population of the campus.

(a) Retention Rates are Lower for African Americans in Each Class.

This analysis compares retention rates of African American to White students for a particular freshman class ("cohort") over a four year period. For example, the class of 1974 had 5,175 first-time freshmen, among whom were 341 enrolled African Americans and 3,962 persons designated as White. By the beginning of the cohort's sophomore year in 1975, 27% of the African Americans had left; 18% of the Whites did not return. By the beginning of the junior year in 1976, 44% of the African Americans had left; 33% of their White

classmates were gone. Finally, by the beginning of the cohort's senior year, 53% of African Americans who had enrolled four years before as freshmen had left without achieving their degree. In contrast, only 39% of the White students had left without completing their education.[68]

This pattern repeats itself for freshman classes over almost two decades. The class of 1989 is the most recent class to reach its senior year. It contained 3,261 first-time freshmen, among whom were 516 African Americans and 2,160 persons designated as White. By the beginning of the cohort's sophomore year in 1990, 16.7% of the African Americans had left; 12.6% of the Whites did not return. By the beginning of the junior year in 1991, 29.7% of the African Americans had left; 21% of their White classmates were gone. Finally, by the beginning of the cohort's senior year in 1992, 37.6% -- over a third -- of the African Americans who had enrolled four years before as freshmen, had left without achieving their degree. In contrast, 25.5% -- a quarter -- of the White students had left without completing their education.[69]

---

[68]See Exhibit 35, Retention History of Five Cohorts: 1974, 1978, 1982, 1986, 1989; Exhibit 36, Retention and Graduation Rates, University of Maryland College Park, First-time, Full-time Freshmen Entering 1974-1981, compiled by Office of Institutional Studies; Exhibit 37, Retention and Graduation Rates, University of Maryland College Park, First-time, Full-time Freshmen Entering 1982-1991, compiled by Office of Institutional Studies.

[69]Exhibit 35, supra, Retention History of Five Cohorts: 1974, 1978, 1982, 1986, 1989.

At no time has the proportion of African Americans being retained approached that of their White classmates. Although the campus' increasingly rigorous admissions standards and retention programs have worked to reduce attrition among both groups -- from 53% for African Americans in 1974 to 37.6% in 1989; and 39% to 26% for Whites -- the differential between them remains virtually what it was twenty years ago. Thus, for example, an African American freshman in 1974 was 14% less likely to reach his or her senior year than a White freshman. Were he or she an entering freshman in 1980, they would have been 21% less likely to return as a senior than White classmates; in 1984 they would have been 15% less likely to reach their senior year. And most recently, beginning with the freshman cohort entering in 1989, attrition among African Americans is such that they are 12.1% more likely than Whites to have left before their senior year.[70]

(b) Retention Rates are Lower Each Year for African Americans in the Student Body as a Whole.

The above analysis shows that retention rates between African American and White students differ within each individual class ("cohort") as its history is traced. A marked differential also emerges when examining attrition in the overall campus populations of African American and White students in any particular year. As will be discussed more fully below under "Graduation," in any single academic year there are typically five undergraduate cohorts working towards

---

[70]Exhibit 38, Percent of Students Leaving Before Senior Year.

their degree (freshmen, sophomores, juniors, seniors, and, increasingly, fifth-year students). The available data, however, demonstrate there is no "leveling-out" or equalizing effect in the extended time-frame which five cohorts might be thought to permit.

At the beginning of the academic year 1978-79, there were 1,785 African Americans of all cohorts enrolled at College Park. By the beginning of the next year, 273 -- 15.7% -- had left without graduating. In contrast, only 9% of the 19,181 White students enrolled in academic 1978-79 did not graduate or return the following fall. This differential between African Americans and Whites, while decreasing after 1988, has nevertheless continued to the present. Most recently, among the total African Americans enrolled in academic year 1991-92, 11.1% did not graduate or return for the Fall Semester, 1992; among the campus' White students, only 6.2% did not complete or continue their education at College Park.[71]

Whether examined class-by-class, or analyzed on the basis of total continuing enrollment, race continues to distinguish between African Americans and Whites in their respective chances of completing their education.

(c) Different Retention Rates Perpetuate the University as a White Institution.

Exhibit 40 presents a look at the total number of

---

[71]Exhibit 39, Percent of Enrolled Students (All Cohorts) Leaving During an Academic Year Without Graduating, 1978-1992.

students, African American and White, who left without attaining a degree in each academic year.[72] It also shows the number of African American and White students entering the freshman class that same year. A comparison of these two sets of numbers emphasizes the difficulty in altering the image, as well as the reality, of College Park as a White institution where African Americans are unlikely to achieve a degree.

In Fall 1978, for example, there were 381 entering African American freshmen. By the end of the 1979-1980 academic year, however, the African American student body as a whole had lost 592 persons. In relative terms, within just two academic years the campus lost an entire class and a half (155%) of African Americans.[73]

These relative losses, although somewhat reduced in the late 1980s, have persisted in every year to the present. In 1980 there was an African American freshman class of 411; within two years the campus had lost a number of African Americans equal to this entire class and a third again (138%). In 1982 there was an African American freshman class of 402; within two years the campus had lost a number of African Americans equal to this entire class and a quarter (124%). In 1986, there was an African American freshman class of 475; within 2 years the campus had lost a number of African Americans equal to this entire class (105%). Most recently, in 1990 there was an African American

---

[72]Exhibit 40, Total Losses, African American and White Students, All Cohorts, in an Academic Year, 1978-1991.

[73]Id.

freshman class of 472; again, by the end of two academic years the campus had lost a number of African Americans equal to this entire class (103%).[74]

The low retention rate of African Americans at College Park contrasts markedly with that of their White classmates. Thus, whereas typically each entering African American freshman class has been destroyed by equal or greater losses from the African American student body every two years, at no time has this happened to the corresponding White freshman group. An equivalent loss to White freshmen generally takes three, and occasionally four years to occur.[75] These differences in retention have visible consequences for campus demographics. The proportion of African Americans in the student population, while increasing, cannot, in the long run, keep pace with Whites. Absent a dramatic improvement in retention rates, African Americans will become an even less visible component than they have been.

(2) Graduation Rates of African American Students are Significantly Lower than those of Whites.

The most visible measure of an institution's ability to educate the persons it has deemed qualified to attain a degree is, of course, the extent to which it enables them to achieve that potential: the extent to which they graduate. But a substantial disparity remains between the proportions of African American and White students in a class who receive their undergraduate degree. This

---

[74] Id.

[75] Id.

differential, like the differential in retention of which it is a corollary, is historical in character. It is present every year for which the University has maintained graduation data by race.

Attainment of an undergraduate degree at College Park now generally requires more than four years. Although many students do receive their degree at the end of their senior year, more continue and graduate at the end of their fifth year. Some continue into a sixth year or beyond, but the number among this last group who eventually graduate is insignificant. Thus, for the purposes of this inquiry, graduation rates are calculated on the number of students in a particular entering class ("cohort") who have graduated by the end of their fifth academic year. For example, in the cohort of 1974 the graduation rate for African Americans was 25%. The graduation rate for White students was 48%. This means at the end of five academic years, i.e., by the end of 1978-80, 25% of the persons who were African American freshmen in the 1974 cohort had graduated, and 48% of the White freshmen in that class graduated. Parenthetically, the graduation rate for all students in that cohort (African Americans, Whites, and other races combined) was 44%.[76]

A comparison of graduation rates for nearly two decades demonstrates the continuing character of disparities between African American students and their

---

[76]See Exhibit 36, supra, Retention and Graduation Rates, University of Maryland College Park, First-time, Full-time Freshmen Entering 1974-1981.

White classmates.[77] At no time have African Americans graduated in proportions close to Whites in the same class. Again, as with retention rates, although the University's increasingly rigorous admissions standards and retention programs have worked to increase the respective graduation rates for each race over time, the relative differential between them remains virtually what it was 20 years ago. Thus, for example, an African American freshman in 1974 was 23% less likely to graduate from the University than a White freshman in the same class. Were he or she an entering freshman in 1980, they would have been 22% less likely to leave the University with a degree than a White classmate; in 1984, they would have been 23.9% less likely to receive a degree. And most recently, African Americans in the cohort of 1987 were 21% less likely to graduate than Whites in their class.[78]

IV. THE UNIVERSITY HAS IMPLEMENTED A NUMBER OF PROGRAMS TO RECRUIT AND RETAIN MINORITY STUDENTS, AND TO IMPROVE THE CAMPUS REPUTATION AND CLIMATE. THESE PROGRAMS HAVE NOT REMEDIED THE PRESENT EFFECTS OF PAST DISCRIMINATION.

The evidence presented above demonstrates the historical link between past discrimination and the

---

[77]Exhibit 41, Percent of Students Graduating by Completion of Fifth Year, 1974 to 1987.

[78]Id.

University's adverse reputation, its perceived hostile climate and its inability to recruit, retain, and graduate African Americans. Over time, these effects have become inter-related. Since the institution was desegregated in 1954, African American students have not enrolled at the University in numbers reflecting their availability in Maryland. The data show too few African Americans have enrolled and too few remain and graduate. Evidence reveals that some African American students who do enroll are discouraged by the lack of role models and mentors, and by experiences they see as related to their race. The result is the University has not successfully educated African Americans in numbers one would otherwise expect absent past discrimination. This pattern, recurring since 1954, perpetuates the University's reputation as a White institution in the African American community and contributes to the perception of an adverse campus climate.

The University has taken many steps, in addition to the Banneker Program, to break this chain. It has charged various commissions, committees, and campus offices with minority recruitment, retention, and improving the campus climate.[79] A complete listing of the University's efforts is contained at Exhibit 42, The Minority Achievement Plan of the University of Maryland at College Park, September 1991 ("Minority Achievement Plan").

Despite the University's increased attention to climate issues, some faculty and students continue to characterize the climate on the campus as hostile to

---

[79]See Exhibit 16, supra, Middle States Periodic Review at 54.

members of minority groups. The supporting evidence has been presented in a number of reports.[80] Similarly, enrollment, retention and graduation rate data, described above, demonstrate the University's programmatic efforts have not achieved the necessary results. In particular, while African American enrollment has improved, although not sufficiently in relation to the available qualified pool, retention and graduation rates consistently have failed to approach those of the majority of the student body, especially White students.

These programmatic efforts have not yet succeeded in eradicating the adverse effects of the University's past on African Americans. It is apparent that race continues to be a differentiating factor in enrollment, retention, and graduation to the disadvantage of African American students on the campus.

---

[80]E.g., Exhibit 6, supra, Walter R. Allen, The Benjamin Banneker Scholars Program for High Achieving African American Students at the University of Maryland at College Park: An Evaluation Study, (December 21, 1992); Exhibit 15, supra, William E. Sedlacek, Black Student Life at the University of Maryland at College Park (December 14, 1992); Exhibit 16, supra, The Middle States Periodic Review Report, June 1992; Exhibit 17 supra, Access is Not Enough, A Report to the President, October 18, 1989; Exhibit 18, supra, Jacqueline Fleming, A Diagnostic Study of the Racial Climate at University of Maryland, College Park (November, 1992); Exhibit 34, supra, The Basic Report of the Committee on Excellence through Diversity: Providing Opportunities for Black Americans at College Park, July 30, 1992.

V. THE BANNEKER PROGRAM IS EFFECTIVE TO REMEDY THE PRESENT EFFECTS OF PAST DISCRIMINATION.

The Benjamin Banneker Scholarship Program was conceived as one measure to remedy the effects of past discrimination. Since its inception in 1979, it has evolved as experience has affected the University's decisions on how best to structure the Program in order to achieve those ends.

The premise of the Banneker Scholarship Program is that the increased enrollment of "high-achieving" African Americans will assist the University in meeting its long-unfulfilled responsibility of educating African Americans equally with other segments of society. This premise has been based on the expectation that Banneker Scholars would be less susceptible to attrition, would reverse racial stereotypes, would serve as visibly successful role models/mentors for other African American classmates, and would graduate in numbers proportionate to non-African American classmates. Ultimately, the enrollment and success of these students creates the nucleus for an active, visible African American alumni base, and a foundation for enhancing the University's reputation in the African American community. The University expects that all these factors, the immediate and the long-term, will act positively to influence the enrollment decisions and success of all African Americans -- both the most talented and those in the larger field of prospective college-bound students. These are results the University has not been able to achieve through other programs.

Evidence demonstrates that the Banneker Program,

unlike the University's other programmatic efforts, has proven an effective remedial mechanism. Particularly persuasive is the statistical study performed by William T. Trent.[81] In part, the Banneker Program has accomplished this purpose by increasing the number of peer mentors and role models available to African American students. Further, the Program is successfully challenging the racial stereotypes of African Americans as under-achieving students.

A. The Banneker Program has Increased the Enrollment, Retention, and Graduation Rates of African American Students.

Banneker scholars have SAT scores and high school grade point averages at the top ranges for all other African American students admitted to the University.[82] Trent's data persuasively demonstrate the Banneker Program has either directly or indirectly facilitated the enrollment of at least twice as many African American students in these high-achievement ranges.[83] Banneker students therefore increase the number of students in

---

[81]Exhibit 43, A Descriptive Study Comparing Recipients of the Benjamin Banneker Scholarship with Non-Recipients for Cohorts of Students Entering the University of Maryland Beginning 1974 and Detailing Enrollment and Degree Attainment, by William T. Trent, Professor of Educational Policy Studies, University of Illinois, January 1993 ("Trent Report").

[82]Exhibit 44, Mean High School Grade Point Averages and SAT Scores: Banneker Freshmen Compared to All African American Freshmen.

[83]Exhibit 43, supra, Trent at 13.

several categories: African American students, high-achieving students, and high-achieving African American students.[84]

More importantly, Trent also presents evidence that the increase in these enrollments has already had a positive effect on overall African American retention and graduation rates. The data show that a Banneker Scholarship improves the recipient's academic performance. Banneker scholars generally have cumulative college grade point averages ("GPAs") higher than African American students who were "A" or "B" students in high school. In a comparison study of students' cumulative college GPA by aid type and race, Trent showed African American Banneker recipients had a higher cumulative GPA for each year of the Program through 1991, compared to other African American students, and to all other students, except students who received the Key Scholarship.[85]

A different assessment of academic performance is presented by Trent's study of the major fields in which Banneker students are concentrated. Banneker students have a higher concentration in those science and technical majors which traditionally have been less accessible to African Americans. Banneker scholars in those fields graduate at rates equivalent to their White counterparts, and at rates higher than other African Americans.[86]

---

[84]See, Exhibit 6, supra, Allen at 43.

[85]Exhibit 43, supra, Trent at 11.

[86]Id.

Banneker scholars graduate at rates significantly higher than African American students receiving other forms of aid or no aid at all.[87] Trent's study showed that those who receive a Banneker award are four times more likely to graduate than those receiving no aid. In comparison, receiving other forms of aid increases the odds of graduating by a factor of 1.4 compared to having no aid.[88] Moreover, Banneker recipients in each SAT math and verbal quartile range generally graduate at a higher rate than other students in those same ranges when aid is not considered. Banneker scholars also are shown to have higher graduation rates than African American students with comparable high school grade point averages.[89] As such, the Banneker Program is a uniquely cost-effective means of remedying the effects of past discrimination. The Washington Legal Foundation has suggested that the University could, by increasing the amount of need-based scholarships, provide financial aid to a wide spectrum of African American students. However, the considered judgment of the University is that it needs to enroll a higher percentage of high-achieving African Americans. It cannot effectively recruit these students with need-based awards. Merit-based scholarships are required. Nevertheless, accepting the premise of the WLF's proposition for discussion, it remains quite impractical. Because of the differential in graduation rates between non-Banneker and Banneker profile students, the University would need to expend much more financial aid over a longer period of time to

---

[87]Id. at 10.

[88]Id. at 15.

[89]Id.

achieve the same remedial effect. Owing to the University's own limited resources, this is a quantity of money which the University could not realistically ever expect to have.

Trent's data are consistent with the conclusion that the Banneker Program influences African American graduation rates generally. Comparing degrees earned in 1976 to those earned in 1990, the number awarded to African Americans at the University increased from 255 to 422, a sixty-five percent (65%) increase. This increase is remarkable in light of the fact the absolute number of African American students enrolled as first-time freshmen during those years remained virtually stable.[90] Trent's study also points out that the most critical years in the increase were from 1986 forward, the years following the full funding of the Banneker Program. Banneker's influence on this increase is supported by Trent's data which show that Bannekers graduate at rates considerably higher than other African Americans. However, Trent's most convincing evidence of the Banneker Program's positive effects is found in a comparison of the University's African American graduation rates to those of all Maryland public colleges. During the same time period, Maryland's other public colleges recognized only a 13.4% gain compared to the University's 65% increase.[91]

---

[90]Exhibits 36, supra, Retention and Graduation Rates UMCP First-time, Full-time Freshmen Entering 1974-1981; Exhibit 37, supra, Retention and Graduation Rates UMCP First-time, Full-time Freshmen Entering 1982-1991.

[91]Exhibit 43, supra, Trent at 17.

Trent's study is supported by other data which show the positive effects of the Banneker Program on the enrollment and performance of African American students. For example, the University has observed an upward trend in SAT scores for all enrolled African American students since the Banneker Program began. Since Banneker began in 1978, the mean combined SAT scores for African Americans has risen 205 points. Banneker's effect on this rise is persuasively suggested by data which show this increase to be over three times higher than the rise in the SAT scores of African Americans in Maryland (61 points) and more than four times the rise nationally (49 points).[92]

Trent's results are also reinforced by other information which shows the Banneker Program's effectiveness in recruiting African American students and keeping them here. For example, the Allen study and the experience of University officials establish the fact that Banneker scholars increase African American enrollments by directly recruiting other non-Banneker African American students.[93]

---

[92]See Exhibit 45, SAT Results: Maryland High School Seniors, Trends In SAT Scores By Race 1979-1989.

[93]Exhibit 6, supra, Allen at 43; Exhibit 8, supra, Davidson Aff. ¶12; Exhibit 9, supra, Clement Aff. ¶31; Exhibit 11, supra, Cothran Aff. ¶11-13; Exhibit 12, supra, Thomas-Walton Aff. ¶10-15.

B. The Banneker Program has Increased the Number of Peer Mentors and Role Models Available to the African American Students.

Banneker students also contribute to improved retention rates by serving as mentors and role models[94] for other African American students.[95] The experiences of Allison George are representative:

> As a high achieving Banneker Scholar, I believe I am a role model for other black students. The Banneker Scholarship is prestigious and automatically brings respect from other black, non-Banneker students. I feel that non-Banneker black students benefit from the [Program] because it allows them to see Banneker Scholars working hard and succeeding academically and this in turn motivates them and helps them to realize their own success. I believe

---

[94]Mentors are teachers. Generally more knowledgeable and senior, they work to transfer their experience to less accomplished or more junior individuals. Role models, often peers, are exemplars. Role models demonstrate that success in an endeavor is attainable. See generally Rogers, J.C. (1986), Mentoring for Career Achievement and Advancement, American Journal of Occupational Therapy, 40(2), 79-80.

[95]Exhibit 6, supra, Allen Report at 43; Exhibit 8, supra, Davidson Aff. ¶12; Exhibit 11, supra, Cothran Aff. ¶12; Exhibit 14, supra, Blackwell Report at 33; Exhibit 46, Affidavit of Ray Gillian, Assistant to the President, University of Maryland at College Park, ¶19; Exhibit 47, Affidavit of Raymond Johnson, Professor of Mathematics, University of Maryland at College Park, ¶28.

> this is true because of the general comments that have been made to me by non-Banneker blacks on campus. For example, it was not uncommon for someone to say to me in passing as I walked to my dormitory room on the honors floor to study that, "Banneker Scholars are always studying" or when discussing hard work and success others would say, "if you can do it, I can do it."[96]

Faculty have noticed them performing this role as well. For example, Dr. William J. Higgins, Associate Dean of the College of Life Sciences, has stated:

> I have noticed with Banneker Scholars in my classes, all students tend to place higher expectations on themselves to participate and to do well in class; this is particularly true for black, non-Banneker students in the class. Individuals tend to identify with other members of their own group, whether that be race, ethnicity or gender. Therefore, when black, non-Banneker students see Banneker Scholars participating in class and doing extremely well, it motivates them to participate and work hard, and gives them confidence that they too can succeed in the classroom.[97]

---

[96]Exhibit 48, Affidavit of Allison George at ¶9.

[97]Exhibit 49, Affidavit of Dr. William J. Higgins, Associate Dean of the College of Life Sciences at ¶5.

Following a decade of research, there is substantial evidence that mentoring enhances the probability of academic success.[98] Studies show it tends to reduce attrition and poor graduation rates by addressing many of the underlying causes of failure: the lack of proper academic preparation for college, the lack of knowledge about or access to social or academic resources, and the absence of a comfortable psychosocial milieu for matriculation:[99]

> Students leave universities before graduation for reasons other than academic ones. Often, the psychosocial climate of a university has a tremendous effect on students, especially those from culturally diverse backgrounds. Effective mentoring involves not only the transfer of academic skills, attitudes, and behaviors but a level of interaction, trust, and communication which results in a psychosocial comfort that

---

[98]See, Cosgrove, T. J. (1986). The Effects of Participation in a Mentoring-Transcript Program on Freshmen. Journal of College Student Personnel, 27(2), 119-124. Russel, J.H., Skinkle, Rodney R. (1990). Evaluation of Peer-Advising Effectiveness. Journal of College Student Development, 31, 388-394. See generally, Hill, S.E.K., Bahniuk, M.H, Dobos, J. (1989). The Impact of Mentoring and Collegial Support on Faculty Success. Communication Education, 38 (1), 15-33.

[99]Redmond, S.P. (1990). Mentoring and Cultural Diversity in Academic Settings. American Behavioral Scientist 34, 188-200. See also, Locke, D.C., Zimmerman, N.A, (1987) Effects of Peer-Counseling Training on Psychological Maturity of Black Students. Journal of College Student Personnel, 28(3), 119-124.

> empowers a student with the knowledge and confidence to grow academically and socially, regardless of the environment. If this growth occurs, the student will be more likely to remain at the university until graduation, thus meeting the need of the university to address the problem of retention.[100]

Within a university setting, similarities of race and peer-status are important to the creation and success of these valuable mentor-protege relationships.[101] The Banneker Program is successfully adding to the number of mentors and role models for African American students.

C. The Banneker Program Successfully Challenges the Stereotype of African American Students as Under-Achievers.

Finally, the Banneker Program's effectiveness must be examined in light of Professor Carl Cohen's declaration, submitted by the Washington Legal Foundation,[102] that race-based programs generally reinforce stereotypes of African Americans as inferior students, and aggravate racial tensions. The University recognizes this to be a potential risk for any institution of

---

[100]Redmond, supra at 190.

[101]Kalbfleisch, P.J., and Davies, Andrea B. (1991). Minorities and Mentoring: Managing the Multicultural Institution, Communication Education, 40 (3), 266-271, and studies cited therein. Locke and Zimmerman, supra.

[102]Exhibit 50, Affidavit of Professor Carl Cohen, Professor of Philosophy, University of Michigan.

higher education. However, there is evidence the Banneker program does not have the adverse effects Professor Cohen believes to have been present at the University of Michigan and at state universities other than the University of Maryland. Quite to the contrary, the University's experience has been that the Banneker Program diminishes racial stereotypes. Professor Walter R. Allen, in an evaluation study of the Banneker program found that "[t]he accomplishments of Banneker Scholars help to challenge negative stereotypes of African Americans as underachievers or stereotypes that would exclude Blacks from certain other major fields."[103] Banneker students are role models for White students, as well as African American students.[104] Majority students have been observed to develop a more positive image of African Americans by interactions with Banneker students both in and out of the classroom.[105] Professor Allen's study concluded that Banneker students, who not only excel academically but also participate in a wide variety of campus activities, actually bridge the barriers of racial division and separation on campus, rather than create

---

[103]Exhibit 6, supra, Allen Report at 43.

[104]Id.; Exhibit 12, supra, Thomas-Walton Aff. ¶4; Exhibit 51, Affidavit of Andrea L. Dennis, Banneker scholar ¶9, 11, 17 ("Dennis Aff."); Exhibit 52, Affidavit of Richard A. Dalgetty, Banneker scholar ¶10, 12 ("Dalgetty Aff."); Exhibit 53, Affidavit of Dr. Edwin Howard Smead, Lecturer, Honors Program ¶8 ("Smead Aff.").

[105]Exhibit 54, Affidavit of Jane Lawrence, Acting Director, Honors Program ¶5 ("Lawrence Aff."); Exhibit 55, Affidavit of Joshua C. Morganstein, student and Resident Assistant, University of Maryland at College Park ¶6 ("Morganstein Aff.").

them.[106] Allen's conclusion that Banneker students are considered by their peers and faculty to be among the University's top students is supported by the Trent study. Trent statistically demonstrated Banneker students consistently perform better than other African American students, and at least equal to or better than other races.[107] Trent's statistical finding is supported by evidence that faculty recognize Banneker students to be "superior students" who through their leadership and interpersonal skills can raise the performance of an entire class.[108]

Based on the evidence presented, the University concludes that concerns regarding the possible dangers of a race-based scholarship are outweighed by Banneker's demonstrated ameliorative effects on racial stereotypes. The University agrees with Trent's conclusion that the Program fully meets its intended objectives of reducing segregation at the College Park campus, with the added benefit of enhancing the status of African American students and improving race relations.[109]

In summary, the University's experience demonstrates the Banneker Program is a highly effective

---

[106]Id. Exhibit 46, supra, Gillian Aff. ¶19; Exhibit 49, supra, Higgins Aff. ¶9.; Exhibit 53, Smead Aff. ¶7; Exhibit 54, supra, Lawrence Aff. ¶5, 8; Exhibit 55, supra, Morganstein Aff. ¶6.

[107]Exhibit 43, supra, Trent at 10-13.

[108]Exhibit 49, supra, Higgins Aff. ¶5; Exhibit 53, supra, Smead Aff. ¶4; Exhibit 54, supra, Lawrence Aff. ¶10.

[109]Exhibit 6, supra, Allen at 18.

means of attracting the most qualified African American students and those most likely to graduate from the University. The Banneker Program also is highly successful in attracting African American students to the technical and scientific fields in which they are sorely underrepresented. Enrollment of Banneker scholars, who represent the best and brightest of African American students, improves the University's image and reputation in the African American community. Banneker therefore is an appropriate means to attract other African American students. The Banneker program encourages those already at the University to persevere and excel. Because they act as role models and mentors to other African Americans, Banneker students have positive effects on the campus climate for those students.

VI. A NON-NEED, RACE-BASED PROGRAM IS NECESSARY TO RECRUIT BANNEKER PROFILE STUDENTS.

The University's experience is that non-need, race-based scholarships are necessary to recruit and retain increased numbers of African American students who meet the Banneker profile. "High-achieving" or "Banneker profile" students are defined as those students who meet or exceed the freshman-year Banneker student's average SAT scores (Math and Verbal) and average high school grade point averages ("HSGPA"). The University's experience with the Frederick Douglass Scholarship teaches that African Americans with Banneker qualifications are not recruited through need-based scholarships. Similarly, the University's experiences with the Key Scholarship proves race-neutral programs result in negligible awards to African

Americans. Finally, the demographics of the Banneker-profile student in the State of Maryland show Non-African Americans so greatly outnumber African Americans that a race-neutral program would result (like the Key program) in a disproportionately small number of awards to African Americans.[110]

A. Banneker-Profile Students are not Recruited by Need-Based Scholarships.

In 1974, as part of the State's desegregation efforts, the University began the Frederick Douglass Scholarship. The program provides scholarships to African American students based solely on financial need. The University's experience with the Frederick Douglass Scholarship demonstrates that Banneker-profile African Americans students are not recruited with need-based awards.

African American students who qualify for need-based awards, because of their academic and cultural experiences, often are not adequately prepared to succeed at a large, predominately White institution. As a result, unlike Banneker-profile students, African American

---

[110]Exhibit 56, Average SAT Scores and High School Grade Point Averages for Non-African American Freshmen compared to African American Freshmen, 1987 to 1992; Exhibit 57, Numbers of African American Students with Average Banneker SAT Scores Compared to Numbers of Non-African American Students with Average Banneker SAT Scores; Exhibit 58, Numbers of African American Students with Average Banneker High School Grade Point Averages Compared to Numbers of Non-African American Students with Average Banneker High School Grade Point Averages.

recipients of need-based aid cannot assume the burden of ameliorating the present effects of past discrimination on campus.[111]

Moreover, many of those students who qualify for need-based aid usually show need in excess of that covered by the available programs.[112] A number of high-achieving African American students qualify for some need-based aid, but not in sufficient dollar amounts to attract them to the University without additional merit-based awards.[113] For example, in 1992, out of 23 Banneker recipients, only 4 were eligible for an amount of need-based aid equal to the cost to attend the University for one year.[114] Conversely, as the above example shows, many high achieving African American students simply do not qualify for need-based aid.[115] Financial aid data confirm that Banneker-profile students often do not qualify for need-based aid.[116] Unless the

---

[111]See Exhibit 8, supra, Davidson Aff. ¶7; Exhibit 59, Affidavit of Ulysses Glee, Director of the Office of Student Financial Aid ¶9 ("Glee Aff.").

[112]Exhibit 59, supra, Glee Aff. at ¶9.

[113]See Exhibit 60, Financial Need of Banneker Recipients, 1990-1992.

[114]Based on an expected budget of $9,871 for a dependent undergraduate student living on the campus for the 1992-93 academic year. Source: Investing in Your Future 1993-94, Office of Student Financial Aid.

[115]Exhibit 59, supra, Glee Aff. ¶13.

[116]Exhibit 60, supra, Financial Need of Banneker Recipients, 1990-1992.

University can offer merit-based aid, it cannot recruit competitively with other institutions for this pool of talent, and will fail to attract qualified African American students.

B. The University's Experience with a Race-Neutral Merit Scholarship Shows that it Fails to Recruit Banneker-Profile Students.

In 1977, the University began the Chancellor's Scholarship Program. In 1988, the name of the Program was changed to the Francis Scott Key Scholarship. The Key Scholarship is a race-neutral, merit-based program. The Key Program awards recipients, among other things, full financial support for four years, thus paying each recipient's tuition, room, board, book expenses, and fees.

The University's experience with the Key Scholarship shows the necessity for a race-based scholarship. The Key Scholarship is required to rely heavily on high school grade point averages and SAT scores in order to distribute a limited amount of aid to an administratively manageable pool of applicants. However, a number of studies show SAT and high school grades are not as valid predictors of success for African American students as they are for non-African American students. The University's experience corroborates the inherent failure of a race-neutral award to select otherwise qualified African Americans. In 1992, African American students received 2 of the 36 Key Scholarships awarded; Whites received 23; Asian Americans received 10; and Hispanics received 1. In 1991, 27 Scholarships were

awarded; in 1990, 52 Scholarships; in 1989, 47 Scholarships. In each of those years, Whites received 19, 41, and 41; Asian-Americans received 5, 7, and 3; Hispanics received 1, 2, and 2; and African Americans received 2, 2, and 1.[117] Since 1987, only 10 African American students have received a Key scholarship out of a total of 216 awardees.[118] However, the academic success of Banneker recipients makes it clear there are many more high achieving African Americans who are qualified for merit-based awards than receive them through the Key Program.

VII. THE BANNEKER PROGRAM HAS A MINIMAL EFFECT ON NON-AFRICAN AMERICANS.

The Banneker Program has a minimal effect on non-African American students at the University. First, decisions regarding the Banneker Scholarship are made separately from, and subsequent to, decisions regarding the admission of students to the University. Therefore, the decision to decline to consider a student for a Banneker scholarship does not adversely affect that person's admission to the University.[119] Secondly, the Banneker Program currently accounts for approximately 1% of the total financial aid available at College Park. For example, in 1989, the year Mr. Podberesky entered the University as a freshman, the total merit-based grants or "scholarships" available from all sources was

---

[117]Exhibit 9, supra, Clement Aff.

[118]Exhibit 61, Francis Scott Key Awards, 1987-1992.

[119]Exhibit 59, supra, Glee Aff.

$10,573,809.[120] In addition, during that same year, $7,980,256 in need-based grants were awarded, including state-funded and federal grants. Need-based and non-need-based loans totaling $14,788,741 were made. $10,130,583 was paid to students for employment with the University as a form "work-study" aid and for other University employment.[121] The total financial aid available from all sources was $43,473,389. Of this total, Banneker scholarships for freshmen accounted for $283,589, or .7% of the total. Total Banneker scholarships for all students (including freshmen) accounted for $488,987, or 1.1% of the total.[122] Thus, the impact of the cost of the Banneker Program on non-African Americans is minimal.

VIII. THE BANNEKER PROGRAM SHOULD BE MAINTAINED ONLY AS LONG AS NECESSARY TO REMEDY THE PRESENT EFFECTS OF PAST DISCRIMINATION.

The University recognizes that race-conscious remedies such as Banneker are subject to strict scrutiny by the courts, and while it assumes that remedying past discrimination and achieving a racially diverse campus community will remain one of its objectives for the foreseeable future, it does not assume that the Banneker Program must be a perennial feature. The University has

---

[120]See Exhibit 62, Types of Financial Aid Awarded for the Fiscal Years 1988-1992.

[121]Id.

[122]Exhibit 63, 1979 to Present, Banneker Scholarship Summary.

long had a compelling basis to believe that the objectives of remedying the continuing effects of past discrimination and achieving a highly diverse student body remain far from realized. Accordingly, it has not yet addressed in an official way what circumstances would obviate the need for Banneker at a future date.

Yet a conception of the relevant circumstances is implicit in the goals it has alluded to in its rationale for the Program: (1) achieving the objective of enrolling, retaining, and graduating an appropriate percentage of African American students; and (2) enrolling and retaining African American students on the College Park campus in sufficient numbers to enable the institution to offer the multi-cultural and multi-racial educational experience it regards as essential to fulfilling its educational mission, which may occur prior to reaching any numerical goal; and (3) effectively countering the lingering effects of its historical identity still present in the minds of many African American citizens of Maryland. The achievement of each of these goals ought to proceed hand-in-hand. Indeed, the demonstrated achievement of any one of these goals should be probative of achieving the other two. In addition, the program should be reviewed periodically. During the course of such reviews, which should occur no less frequently than every three academic years, the University should examine whether the Banneker Program, or a functional equivalent, should be continued.

IX. THE UNIVERSITY HAS A SPECIAL OBLIGATION TO ATTRACT AND RETAIN MORE AFRICAN AMERICAN STUDENTS IN ORDER TO ATTAIN DIVERSITY.

To fulfill its instructional mission, the University seeks to provide its undergraduate and graduate students with a learning environment of the highest caliber. To do this, the University must create an environment consisting of a rich undergraduate curriculum that introduces students to broad areas of knowledge and stimulates their intellectual curiosity and creative talents. The University also must create an academic community which fosters intellectual growth, commitment to diversity, and appreciation for different cultures.[123] The University's interest in assembling an academic community which fosters a commitment to diversity, appreciation for different cultures, and intellectual growth does not represent an exogenous political or philosophical choice, but rather an essential component of its instructional mission.[124]

The evidence produced in this proceeding confirms that the University has a powerful interest in the composition of its student body in light of its mission and function. For example, the Affidavit of Dr. Donna E. Shalala, then Chancellor of the University of Wisconsin-

---

[123]See Exhibit 64, University of Maryland at College Park Mission Statement, approved by the Maryland Higher Education Commission on February 13, 1990, at 1-2.

[124]See Exhibit 65, The Value of Diversity in Higher Education, by Goodwin Liu (September 1992), submitted by the American Council on Education.

Madison, now Secretary of the Department of Health and Human Services, demonstrates that a university's commitment to ethnic diversity is integral to its fundamental commitment to excellence in education:

> The [numerous programs to recruit and retain minority students and faculty] at the UW-Madison grew out of the conviction that the quality of educational experience for all students at UW-Madison was and remains seriously compromised by the limited ethnic and cultural diversity of the faculty and the students. The University's commitment to ethnic diversity is integral to its fundamental commitment to excellence in education. Education encompasses a commitment to learning, a belief for the search of truth for its own sake, and exposure to differing points of view and cultures. The University cannot provide a quality education -- that is, an education which will prepare students to live, work and provide leadership in the United States -- without the active participation of and exposure to a diverse student body. The University must prepare its students to live and be productive in the ethnically diverse communities of our State, the country and the world.[125]

The University shares her expert educational judgment that "quality education takes place through wide exposure

---

[125]Exhibit 66, Affidavit of Donna E. Shalala at ¶¶3-4.

to the robust exchange of ideas which leads to the discovery of truth. This robust exchange is facilitated and enhanced when the students are brought together from various backgrounds and ethnic groups."[126]

The University agrees with the finding of other universities that the need for a racially diverse body to accomplish their educational mission is particularly important in light of the lingering effects of legal segregation:

> [At Washington University in St. Louis] we believe it to be particularly important that the student body be racially diverse. Americans of different races often have little knowledge of each other. The citizens of our nation live separated and the most separated among us are African Americans. While de jure segregation is a thing of the past (albeit the recent past), the attitudes and stereotypes that accompanied legal segregation have not disappeared. Changes in beliefs and attitudes require time and education. We think it important that American institutions, in partnership with government, take active steps to make these institutions places where African Americans feel welcome and to continue the work of dismantling old ideologies and prejudices.

---

[126]Id. at ¶5. See also Exhibit 67, Affidavit of Sheldon Hackney, President of the University of Pennsylvania, at ¶9 ("[T]he most compelling institutional interest in achieving diversity is the educational necessity of preparing students to live in an increasingly diverse society.")

> Educational institutions like Washington University have a special role to play in this regard.[127]

A publicly supported institution of higher education such as the University has a special obligation to enroll a student population that roughly reflects the demographics of the state in which it is located, and in which its graduates will work and live.[128]

In the University's most recent re-accreditation report, The Middle States Periodic Review 1991-1992, a broadly representative (but largely faculty) committee stated that:

> We regard this emphasis on diversity within our official mission statement as entirely warranted by our status as a *public* university. If an institution is seriously committed to the goal of achieving effective representation of various segments of the wider community, it will need a wide range of recruiting, nurturing, and curriculum-reform measures in order for its inclusionary goal to stand a chance of being achieved. . . . We also regard the creation of a diverse academic environment; i.e., a community reflecting a plurality of cultural, racial, ethnic, and gender perspectives, as an inherently appropriate *educational*

---

[127]Exhibit 68, Affidavit of William H. Danforth, Chancellor of Washington University, at ¶6.

[128]See Exhibit 33, supra, Muller Aff., supra at ¶7.

objective [italics in original]. . . .[129]

Only by working to increase the numbers of minority students can the University succeed in providing the kind of multi-cultural educational experience its students will need to meet the challenges they will face in the future. An increased minority presence is necessary to create the welcoming campus atmosphere essential to recruiting and retaining high-quality faculty and students of all races and backgrounds and to achieve the goal of national eminence.[130]

Thus both the University's State-approved mission statement and its most recent institutional re-accreditation report identify the pursuit of a racially diverse campus community as an essential measure in attaining the academic goals set out for the institution. The State and University regard the achievement of a diverse campus community as integral to achieving the degree of academic excellence mandated for the institution by the 1988 Maryland Higher Education Act. The Banneker Program supports the State's specific interest of having its comprehensive research institution rank among the nation's leading public universities.

The targeting of financial support to a particular under-represented group is an effort subordinated to the larger aim of diversity. The University as a whole focuses a small portion of its overall scholarship

---

[129]Exhibit 16, supra, The Middle States Periodic Review Report, the University of Maryland at College Park (June 1992), at pp. 49-50.

[130]Id. at pp. 50-51.

resources in order to recruit African American students in connection with its larger objective of enjoying a highly diverse campus community. Such an effort does not represent an activity isolated from or in any way antithetical to its broader diversity goal; to the contrary, it is just what the University regards as a directly relevant and highly effective means for achieving the diversity it values. In short, a scholarship program expressly devoted to the purpose of recruiting larger numbers of well-qualified African American students represents a narrow tailoring of the University's resources and energies to just the area in which it faces the single greatest recruitment challenge.

X. THE BANNEKER PROGRAM IS A VALUABLE AND APPROPRIATE TOOL TO AVOID OCR INTERVENTION.

Maryland has been subject to federal mandates since March 1969, when the Director of the U.S. Department of Education, Office for Civil Rights ("OCR") informed the State it was operating a racially segregated system of higher education. OCR took specific issue with the fact the University of Maryland at College Park and three other State colleges still had an enrollment which was approximately 99% White.[131] The State responded by developing plans to achieve a more representative racial balance among its four-year

---

[131]Exhibit 69, An Analysis of the Role of the Office for Civil Rights in the Enforcement of Civil Rights in Higher Education in Maryland by Robert A. Dentler (December 1992) at 10, ("Dentler Report").

public institutions of higher education.[132] OCR, however, retains the authority to require and review the State's affirmative action plans, and to pursue further enforcement action if it is not satisfied with the State's progress in providing equality of opportunity for African American students.[133] As late as November 1989, OCR was voicing dissatisfaction with the State's progress and announcing further investigative efforts.[134] OCR's monitoring and review functions still continue.[135]

One of the mechanisms for avoiding the adverse consequences flowing from the initiation of enforcement proceedings by OCR is to implement voluntary plans to remedy the effects of discrimination. This is a mechanism that has proved successful for Maryland, as it has for other states.[136] The Banneker Program is part of the State's response to the various enforcement actions taken by OCR. Indeed, because OCR was first to identify scholarship grants to African American undergraduates as a necessary means of recruiting African American students to predominantly White campuses such

---

[132]Id. at 6-20.

[133]34 C.F.R. §100.3(b)(6)(i).

[134]Exhibit 69, supra, Dentler at 14, 19.

[135]Id. at 20.

[136]Compare Exhibit 31, supra, Affidavit of Fred R. Sheheen at ¶6 (implementing voluntary plans achieved release of South Carolina from the mandate of the federal government), with Exhibit 69, supra, Dentler at 23 (failing to file acceptable desegregation plans lead to court-ordered remedies in Alabama that will continue for another decade).

as the University,[137] and because the Banneker Program is an effective means of eliminating the vestiges of past discrimination identified by OCR since 1969, the State has a compelling interest in its continuation as a means of defending against greater federal intervention.

CONCLUSION

The evidence submitted during the course of this review convincingly establishes that the Banneker Program is a highly effective means for countering significant lingering effects of the University's historical identity as a discriminatory institution. The Banneker Program also supports the University's effort to create and sustain the diverse campus community identified as essential to providing a high-quality education. Since the Banneker Scholarship Program satisfies several substantial and legitimate State interests, and is narrowly tailored in pursuit of them, it is the University's conclusion that the Program meets the requirements established by the courts for a permissible race-conscious remedy.

WILLIAM E. KIRWAN
President, University of
Maryland at College Park

[137]Exhibit 69, supra, Dentler at 10-17.

Constitutional and Statutory Provisions Involved

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the

benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

Nos. 94-1620, 94-1621

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

WILLIAM KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

SAMUEL PODBERESKY
253 Milthorn Court
Riva, MD 21140
(410) 269-1635

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave, NW
Washington, DC 20036
(202) 588-0302

Date: May 1, 1995

QUESTIONS PRESENTED

I. Whether a state university which formerly excluded blacks but which at least 40 years ago eliminated all policies and practices -- traceable to the segregative era -- which had segregative effects, is nonetheless permitted under the Fourteenth Amendment to provide race-exclusive benefits in order to alter certain blacks' perceptions of the university and alter some black students' voluntary enrollment patterns.

II. Whether a publicly-funded academic scholarship program that is open to all blacks without regard to citizenship, residence, or financial need but that excludes all nonblacks is "narrowly tailored" to eliminating continuing effects of pre-1954 racial discrimination against blacks.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

REASONS FOR DENYING THE PETITION 11

I. THE DECISION BELOW WAS MANDATED BY THIS COURT'S *FORDICE* DECISION 13

II. THE DECISION BELOW WAS FULLY CONSISTENT WITH CASE LAW REGARDING "NARROWLY TAILORED" REMEDIES 18

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY RECENT APPELLATE DECISIONS 24

IV. PETITIONERS HAVE NOT PROPERLY RAISED THE "DIVERSITY" ISSUE 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Ayers v. Fordice, No. 4:75CV009-B-O, ___ F. Supp. ___ (N.D. Miss. Mar. 7, 1995) . . . 18

Bazemore v. Friday, 478 U.S. 385 (1986) 16

Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994) 17, 25-26

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) 25-26

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 11, 13, 18, 21, 26

Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992) 30

Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 27

Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986) 26

Green v. County School Board of New Kent County, 391 U.S. 430 (1968) 15

Guardians Ass'n v. Civil Service Comm'n of City of New York, 463 U.S. 582 (1983) 28

Hammon v. Barry, 813 F.2d 412 (D.C. Cir. 1987), *reh. denied*, 826 F.2d 73 (D.C. Cir.), *cert. denied*, 486 U.S. 1036 (1988) 17

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207 (4th Cir. 1993) 19

Hirabayahi v. United States, 320 U.S. 81 (1943) 12

In re Birmingham Reverse Discrimination Litigation, 20 F.3d 525 (11th Cir. 1994), *cert. denied sub nom., Martin v. Wilks*, ___ U.S. ___, 63 U.S.L.W. 3754 (April 17, 1995) 28

Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994) 15

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) 22

Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974) . . 25-26

Palmer v. District Board of Trustees of St. Petersburg Junior College, 748 F.2d 595 (11th Cir. 1984) 27

Regents of University of California v. Bakke, 438 U.S. 265 (1978) 12, 20, 29

Shaw v. Reno, 113 S. Ct. 2816 (1993) 12, 21

Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) 17, 25

United States v. Fordice, 112 S. Ct. 2727 (1992) . . . . . *passim*

United States v. Paradise, 480 U.S. 148 (1987) 18

Valentine v. Smith, 654 F.2d 503 (8th Cir.) *cert. denied*, 454 U.S. 1124 (1981) 27

Weinberger v. Salfi,
422 U.S. 749 (1975) 28

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 12, 13, 18

Constitutional Provisions and Statutes:

U.S. Const., 14th amend.
(Equal Protection Clause) 4, 10, 28

42 U.S.C. § 1981 . . . . . 4, 28

42 U.S.C. § 1983 4

Civil Rights Act of 1964, Title VI,
42 U.S.C. § 2000d *et seq.* 4, 8, 10, 27-28

Miscellaneous:

"Banneker's future affected by many,"
The Diamondback (April 13, 1995) 3, 21, 30

59 Fed. Reg. 8956 (Feb. 23, 1994) 28

S. Ct. R. 10.1 28

Fed. R. Civ. P. 56 29

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Nos. 94-1620, 94-1621

WILLIAM E. KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-29a) is reported at 38 F.3d 147. The order of the Court of Appeals denying Petitioners' petitions for rehearing (Pet. App. 30a-33a) is reported at 46 F.3d 147. The opinion and order of the district court (Pet. App. 34a-95a) are reported at 838 F.Sup. 1075.

The case was argued before both the Court of Appeals and the district court on a prior occasion. The first

opinion of the Court of Appeals (Pet. App. 96a-108a) is reported at 956 F.2d 52. The first memorandum and order of the district court (Pet. App. 109a-138a) are reported at 764 F. Supp. 364.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1994. On November 10, 1995, Petitioners filed petitions for rehearing with suggestions for rehearing in banc. Those petitions were denied by an order of the Court of Appeals entered December 30, 1994. The petitions for a writ of certiorari were filed on March 29 and 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case is before the Court for a determination of the legality of the Banneker Program, a non-need-based academic scholarship program operated and funded by the University of Maryland at College Park (UMCP) that sets aside a number of scholarships solely for blacks. Banneker Scholarship recipients receive a four-year, all-expenses-paid grant. Respondent Daniel Podberesky was denied an opportunity to compete for a Banneker Scholarship because he is not black.

Mr. Podberesky was accepted by UMCP in the fall of 1989 and invited to participate in UMCP's selective honors program. He enrolled in the fall of 1990 and graduated Phi Beta Kappa in May 1994 with a 3.8 grade point average ("GPA") and a degree in biochemistry. He is now completing his first year in medical school.

As an applicant to UMCP, Mr. Podberesky's academic credentials were outstanding. He scored 1340 (out of a possible 1600) on the November 1989 Scholastic Aptitude Test (SAT), the standardized test of verbal and mathematical skills taken by virtually all UMCP applicants. As calculated by his high school, his GPA through

his junior year in high school exceeded 4.00 on a scale of 0-4. Mr. Podberesky's active participation in extracurricular and community service programs while in high school demonstrated his tremendous leadership potential.

In conjunction with his application for admission to UMCP in the fall of 1989, Mr. Podberesky asked to be considered for an academic scholarship. UMCP has maintained two merit-based, academic scholarship programs that are the focus of this case: the Banneker Program and the Francis Scott Key Scholars Program (the "Key Program").[1] The Banneker Program provides benefits to each scholarship winner worth about $35,000 for in-state students (and considerably more for those from out of state), covering full financial support for four years of college, including tuition, room, board, book expenses, fees, and other benefits. The Key Program provides virtually identical benefits. Most recently, roughly 30 Banneker Scholarships and 30 Key Scholarships have been awarded each year.[2]

Scholarships are awarded under the Banneker and Key programs to academically talented students without regard to their parents' financial resources. Incoming UMCP students receive consideration for such scholarships if and only if their SAT scores and high school GPAs meet cer-

---

[1] Funds for the Key and Banneker Programs have come from the same pool of state and tuition money and have been split on a 50-50 basis. Court of Appeals Joint Appendix ("J.A.") 566-67. State desegregation funds play a very small role in Banneker funding.

[2] Following the Court of Appeals's denial of the petitions for rehearing, UMCP announced that, pending completion of appeals in this case, it was combining the two programs into a new academic scholarship program to be known as the Banneker-Key Program. About 60 scholarships are to be awarded annually under this new program, with race to be taken into account as one factor in the award of scholarships. *See* "Banneker's future affected by many," *The Diamondback*, at 1 (April 13, 1995). UMCP stated that it would reestablish the Banneker Program should it ultimately prevail in this litigation. *Id.*

tain pre-established minimums; these minimum requirements are set high enough so that only a small group of students meet the minimums and receive further consideration for scholarship awards. Mr. Podberesky's SAT score and high school GPA placed him just below the threshold for further consideration under the Key Program. Pet. App. 99a n.2.

On the other hand, his academic credentials far exceeded those required for further consideration under the Banneker Program; the minimum requirements for further consideration under the Banneker Program were a 900 SAT score and a 3.0 GPA. Pet. App. 99a. Nonetheless, Mr. Podberesky was not considered for a Banneker Scholarship because he failed to meet an additional requirement applicable to the Banneker Program (but not the Key Program): Banneker Scholarships are awarded only to blacks, and Mr. Podberesky is Hispanic. Mr. Podberesky protested to UMCP officials that the setting aside of financial aid funds for members of only one race violated his constitutional rights, but he failed in his efforts to receive further consideration for any of UMCP's merit-based scholarships.

Proceedings Below. Mr. Podberesky filed suit in federal district court in Baltimore against UMCP and its President, William E. Kirwan (the "Kirwan Petitioners"), on June 22, 1990. The complaint alleged that by refusing to consider Mr. Podberesky for a Banneker Scholarship because of his race, Petitioners violated 42 U.S.C. § 1983 (by denying him his Fourteenth Amendment rights to due process and equal protection under the law); the Civil Rights Act of 1866, 42 U.S.C. § 1981; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Mr. Podberesky requested, *inter alia*, that UMCP be enjoined from continuing to operate the Banneker Program in a racially discriminatory manner, and that it be ordered to fully consider him for a Banneker Scholarship without regard to his race.

The parties filed cross motions for summary judgment in January and February, 1991. Petitioners' motion raised only one argument in defense of their racially exclusionary financial aid policy: the need to eliminate the alleged vestiges of Maryland's former dual education system. The motion did not defend the policy based on an alleged compelling need to establish a racially diverse student body.

In an order dated May 15, 1991, the district court granted Petitioners' motion for summary judgment and denied Mr. Podberesky's cross motion. Pet. App. 138a. The court stated that the Banneker Program should be evaluated under a "strict scrutiny" standard, thereby requiring UMCP to demonstrate a "compelling interest" in the program in order to justify its continuation. Pet. App. 121a-122a. The court then held that the program could withstand "strict scrutiny" analysis; it held that Petitioners had a compelling interest in continuing the Banneker Program as a remedial measure necessary to eliminate vestiges of Maryland's former dual education system. Pet. App. 130a. Without directly addressing what "present effects" of past discrimination continued to exist at UMCP, the court said, "[T]he effects of longstanding discrimination are pervasive, and there is ample evidence in the record before me to support the view of UMCP officials that it is premature to find that there are no present effects of past discrimination at the university." *Id.* The district court went on to hold that the Banneker Program was sufficiently "narrowly tailored" to eliminate the vestiges of Maryland's former dual education system. Pet. App. 130a-133a.

Mr. Podberesky appealed both from the grant of Petitioners' summary judgment motion and from the denial of his own summary judgment motion. In an Opinion dated January 31, 1992, the Court of Appeals reversed the May 15, 1991 Order and remanded the case to the district court. Pet. App. 96a-108a.

The Court of Appeals noted that all parties recognized that UMCP had a history of racial discrimination against

blacks but that the discrimination had ended years before Mr. Podberesky sought a Banneker Scholarship in 1990. The court held that a state attempting to justify a racial preference program on remedial grounds must do much more than present evidence of past discrimination against the currently-favored group, particularly when the past discrimination ended other than in the immediate past:

> [I]n order to justify a race-based remedy in a case where identifiable discrimination occurred a number of years in the past, a finding of such discrimination is not sufficient. There must be some present effect of this past discrimination that the program is designed to redress.

Pet. App. 106a.

The Court of Appeals held that the district court erred in granting summary judgment for Petitioners in the absence of an explicit finding of such present effects and added that "no such evidence of present effects was brought to our attention *nor is it part of the record.*" Pet. App. 107a (emphasis added). The Court of Appeals directed the district court to make:

> [A] determination as to the present effects of past discrimination at UMCP. Should no further evidence be available upon remand, summary judgment for [Mr. Podberesky] would be appropriate.

Pet. App. 108a.

On remand, the district court denied Mr. Podberesky's request for an immediate hearing on his pending summary judgment motion. Instead, it granted Petitioners' request for a lengthy delay in proceedings to permit them an

opportunity to investigate present effects of past discrimination at UMCP.[3]

By order dated November 18, 1993 (as amended November 22, 1993), the district court granted Petitioners' motions for summary judgment and denied Mr. Podberesky's renewed motion for summary judgment. Pet. App. 95a. The district court found *as a matter of law* that there was "strong evidence" to support Petitioners' contention there exist present effects of UMCP's past racial discrimination in at least four areas: (1) UMCP's allegedly poor reputation among Maryland blacks; (2) alleged "underrepresentation" of blacks in the UMCP student body; (3) lower retention rates for blacks than for nonblacks; and (4) "perceptions of a college campus that is hostile to African-Americans." Pet. App. 52a. The district court further found *as a matter of law* that the Banneker Program was "narrowly tailored" to eliminating those alleged present effects of UMCP's past racial discrimination. Pet. App. 81a-88a.[4]

---

[3] In July 1992, the district court also granted a motion to intervene filed by a group of UMCP students then receiving Banneker Scholarships and a group of black Maryland high school students who hoped to receive Banneker Scholarships in the future (the "Greene Petitioners").

[4] Given the case's posture at the time the district court issued its decision (cross-motions for summary judgment), the district court erred -- as the Court of Appeals noted (Pet. App. 18a) -- by resolving disputed factual issues and entering lengthy factual findings that essentially mirrored Petitioners' view of the case. In their Statement of the Case, the Kirwan Petitioners cite repeatedly to the "findings" of the district court and suggest that those "findings" are synonymous with the record evidence. That suggestion, of course, is incorrect as a matter of law.

Indeed, many of the district court "findings" upon which Petitioners rely have no evidentiary basis whatsoever. Space does not permit Mr. Podberesky to point out all the unfounded claims included in Petitioners' Statements of the Case, but a few merit mention. In particular, the district court's and Petitioners' accounts of federal

(continued...)

Mr. Podberesky appealed to the Court of Appeals from the denial of his own motion for summary judgment and the grant of summary judgment to Petitioners. In an Opinion dated October 27, 1994, the Court of Appeals vacated the district court's judgment and remanded with instructions that summary judgment be entered for Mr. Podberesky. Pet. App. 1a-29a.

The Court of Appeals held that the district court erred in granting summary judgment to Petitioners, because Mr. Podberesky had submitted considerable evidence that no

---

[4] (...continued)
government involvement in Maryland desegregation efforts are wildly distorted: (1) the Office for Civil Rights (OCR) of the U.S. Department of Health, Education & Welfare *never* issued any formal findings that Maryland's higher education system was not in compliance with Title VI; (2) the 1985-89 higher education desegregation plan submitted by Maryland to OCR (Exhibit 8 to Respondent's 1991 summary judgment motion) made no reference (either direct or indirect) to the Banneker Program (either to the modest program that was open to other racial minorities in 1985 or to the vastly expanded, blacks-only version of the program adopted in 1988), and thus OCR's acceptance of that plan cannot be construed as OCR endorsement of the Program; (3) the 1985-89 plan is irrelevant in any event, because it was no longer in effect during the years at issue in this lawsuit; and (4) while OCR (in connection with its Title VI enforcement responsibilities over all U.S. colleges and universities) is currently reviewing UMCP's compliance with Title VI, Petitioners are off base in suggesting (Kirwan Pet. at 11) that Maryland will not have "achieved [Title VI] compliance" until the review is complete.

Petitioners have also omitted numerous relevant statistics regarding integration at UMCP, including: (1) UMCP's black enrollment rate is the second highest among major state universities and has been steadily increasing for 25 years (Pet. App. 11a-12a), and it consistently ranks among the top three historically white universities in terms of the number of African Americans graduating each year (J.A. 820, 710, 973); (2) the differential between white and black graduation rates at UMCP is significantly smaller than the differential at NCAA Division I schools taken as a group (Addendum to Respondent's March 24, 1994 Fourth Circuit Reply Brief); and (3) UMCP administrators vigorously deny that the school has discriminated against blacks in any way during the past two decades (J.A. 2848-9, 2854-5), and the Greene Petitioners do not allege otherwise.

vestiges of UMCP's past racial discrimination remained on the UMCP campus. Pet. App. 18a. The Court of Appeals further held that two of the four alleged vestiges of past discrimination cited by the district court (UMCP's allegedly poor reputation among Maryland blacks and alleged non-institutional racial hostility on the UMCP campus) are insufficient to justify race-exclusive remedial action. Pet. App. 10a. The court stated:

> [A]ny poor reputation the University may have in the African-American community is tied solely to knowledge of the University's discrimination before it admitted African-American students [beginning in 1954]. There is no doubt that many Maryland residents, as well as some citizens in other States, know of the University's past segregation, and that fact cannot be denied. However, mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy.

Id.[5]

Finally, with respect to the other two vestiges alleged by Petitioners (alleged "underrepresentation" of blacks on the UMCP campus, and lower retention rate for blacks than for whites), the Court of Appeals held as a matter of law that the Banneker Program was not "narrowly tailored" to remedying those alleged vestiges. Pet. App. 19a. In particular, the court found that Petitioners had failed to demonstrate that those alleged vestiges could not be remedied in a race-neutral manner. Pet. App. 26a-27a.

On December 30, 1994, the Court of Appeals denied Petitioners' motions for rehearing with suggestions for rehearing in banc. Pet. App. 30a-33a. The Kirwan Peti-

---

[5] The Court rejected the "racial hostility on campus" argument on the additional ground that Petitioners had presented no evidence that the alleged hostility was causally related to UMCP's previous discriminatory acts. Pet. App. 11a.

tioners and the Greene Petitioners filed separate certiorari petitions on March 29 and 30, 1995.

SUMMARY OF ARGUMENT

The court below struck down -- as a violation of Title VI and the Fourteenth Amendment's Equal Protection Clause -- UMCP's blacks-only scholarship program, ostensibly established for the purpose of remedying the school's past racial discrimination against blacks. Several factors counsel against this Court's review of the decision.

First, no other appellate court has addressed the propriety of such scholarship programs. That means, of course, that there is no direct conflict between the Fourth Circuit's decision and any other appellate decision. The allegedly conflicting decisions pointed to by Petitioners present fact patterns bearing little resemblance to this case. All of those decisions predate this Court's seminal affirmative action decisions, and most do not even arise within the context of higher education.

Second, although hundreds of colleges and universities administer race-based scholarship programs, it is not at all clear that those programs, because of their disparate criteria and justifications, will be affected by the Fourth Circuit's decision. Determining whether the factual predicates for a race-based scholarship program exist at a particular school is necessarily a fact-intensive exercise; the Fourth Circuit's decision that UMCP failed to establish those predicates does not prevent other schools from doing so. Moreover, the rationale behind the great majority of race-based scholarship programs in this country -- a desire to diversify the student body -- is not addressed by the Fourth Circuit's decision.

In any event, the Fourth Circuit's decision was virtually mandated by this Court's precedents. In *United States v. Fordice*, 112 S. Ct. 2727 (1992), the Court held that a state with a history of *de jure* segregated higher education must dismantle that system by: (1) adopting a

race-neutral admission policy; and (2) eliminating "to the extent practicable and consistent with sound educational practices" those policies traceable to the prior system that have discriminatory effect. *Fordice*, 112 S. Ct. at 2736. The undisputed record in this case demonstrates that Maryland and UMCP have long since fulfilled their obligations under *Fordice*. Accordingly, UMCP lacked any compelling reason to attempt to further "remedy" the effects of the pre-1954 segregated higher education system by adopting a racially discriminatory scholarship program.

Finally, Petitioners' claim that the Banneker Program served UMCP's compelling interest in a racially diverse student body is without support and is not properly presented for review. That claim has not been passed on by any of the federal courts that have considered this case. More importantly, Petitioners failed to raise that claim in response to Mr. Podberesky's initial motion for summary judgment and thus should not be permitted to raise it at this late date. Moreover, to the extent record evidence does exist, it indicates that achieving diversity was not in fact the reason UMCP adopted the Banneker Program.

REASONS FOR DENYING THE PETITIONS

In striking down a state-sponsored scholarship that discriminates on the basis of race, the Fourth Circuit was simply following clear-cut authority from this Court. A long line of decisions from the Court makes clear that programs that discriminate on the basis of race are highly disfavored under the law. Moreover, the decision below does not conflict with decisions from any other federal appellate court. The Court should deny the petitions.

Racial classifications are a "highly suspect tool" that reviewing courts should uphold only under extremely limited circumstances. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989)(plurality opinion); *id.* at 520 (Scalia, J.). That is so because, "Classifications of citizens solely on the basis of race 'are by their very

nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993)(quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The Court is also mindful of the potential harmful effect of even the most remedial of racial classifications: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno*, 113 S. Ct. at 2832.

Petitioners' establishment of a racially exclusive scholarship fund is no less suspect because it is employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority. *Croson*, 488 U.S. at 494 (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 295-99 (1978)(Powell, J.). *Shaw v. Reno* puts to rest any argument that the Court will treat deferentially racial classifications that favor groups that suffered from past discrimination. In a decision that called into question the constitutionality of drawing congressional districting lines according to the race of constituents, the Court said:

> [T]he dissent argues that racial gerrymandering poses no constitutional difficulties when lines are drawn to favor the majority. . . We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S., at 494 (plurality opinion); see also *id.*, at 520 (Scalia, concurring in judgment). Accord *Wygant* [*v. Jackson Board of Education*], 476 U.S. [267,] 273 [(1986)] (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Shaw v. Reno, 113 S. Ct. at 2829.

Petitioners' attempts to distinguish *Croson, et al.*, are unavailing. They argue that "[t]he standards set out in *Croson* and *Wygant* . . . are inapplicable in this case" because in those cases, unlike this one, the allegedly remedial racial classifications were adopted "in the absence of any findings of discrimination." Kirwan Pet. at 17. That view of the law is a clear misreading of *Croson* and *Wygant*. Those decisions make clear that it is not the mere historical fact of past discrimination that triggers a state interest in remedial schemes; rather, the focus should be on whether there exist *present effects* of past racial discrimination. *Wygant*, 476 U.S. at 274 (plurality opinion). In the absence of such present effects, there can be no justification for race-conscious remedial measures. *Id.* Nothing in the language of *Croson* or *Wygant* supports Petitioners' contention that a finding of past discrimination lessens a state's heavy burden in attempting to justify a racial classification.[6]

I. THE DECISION BELOW WAS MANDATED BY THIS COURT'S *FORDICE* DECISION

Petitioners contend that the decision below overlooked and is inconsistent with this Court's case law regarding a state's affirmative obligation to take steps to eliminate vestiges of *de jure* segregated systems of education. Kirwan Pet. at 14-21; Greene Pet. at 17-20. That contention is without merit.

---

[6] Moreover, *Croson* is *not* factually distinguishable from this case. While all parties agree that UMCP excluded black students prior to 1954, the evidence of past discrimination against blacks was no less strong in *Croson*. That case involved government contracts set aside solely for minority-owned businesses by the City of Richmond, the capital of the Confederacy during the Civil War. Richmond had a centuries-long history of *de jure* discrimination against African Americans that continued well beyond 1954. *Croson* nonetheless imposed exacting scrutiny on Richmond's "remedial" set-aside program and focused exclusively on the *present effects* of past discrimination.

In *United States v. Fordice*, 112 S. Ct. 2727 (1992), a case in which the federal government was challenging the adequacy of Mississippi's desegregation efforts, the Court explained what a state must do in order to eliminate the vestiges of a *de jure* segregated higher education system. In addition to adopting a race-neutral admission policy, a state with a history of segregated higher education must also eliminate "to the extent practicable and consistent with sound educational practices" those policies traceable to the prior system that have discriminatory effect. *Fordice*, 112 S. Ct. at 2736. The Court explained:

> If the state perpetuates policies and practices traceable to its prior system that continue to have segregative effects -- whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system -- and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose.

Id. at 2737.

Fordice dictates that this case focus on UMCP "policies" or "practices" that are having segregative effects. Once the issues are focused in that manner, Petitioners' case collapses. Petitioners have never identified a single UMCP "polic[y]" or "practice[]" traceable to the pre-1954 era that has or has had segregative effects. Even the district court found that UMCP has maintained race-neutral admissions procedures since 1954. Accordingly, UMCP has at all times since 1954 done all that is required of it under *Fordice*. Moreover, if there were such "policies" or "practices," *Fordice* dictates that they be

eliminated, not that UMCP adopt racially discriminatory programs designed to overcome their segregative effects.[7]

Petitioners' reliance on *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), and other cases dealing with steps necessary to desegregate elementary and secondary schools (*see* Kirwan Pet. 15-17), is misplaced. The Court held in *Fordice* that dismantling formerly segregated institutions that obtain their participants through the voluntary choices of individual participants (a category that includes colleges and universities) does not require the broad-based affirmative remedies outlined in elementary/secondary school cases such as *Green*. *Fordice*, 112 S. Ct. 2736-37. Rather, a state's only obligation in the area of higher education is to eliminate un-

---

[7] Appellees cite *Knight v. Alabama*, 14 F.3d 1534, 1553 (11th Cir. 1994), for the proposition that a university harboring a racially hostile climate that has segregative effects and that is traceable to the segregative era is bound by *Fordice* to take steps to remedy that climate. Mr. Podberesky submits that that *dictum* in *Knight* is a clear misreading of *Fordice*; it is difficult to conceive how a campus climate could be considered to be a "policy" or "practice" of a university. *Fordice* might require a university to eliminate policies or practices (dating from the segregative era) that foster a racially hostile campus climate, but the climate itself is not something a university can control as a matter of "policy."

In any event, nothing in *Knight* is contrary to the result reached by the court below. *Knight* declined to order a remedy against Alabama based on the plaintiffs' "racially hostile campus" allegation, finding that the state was "doing all that [it could] practicably do" to address the issue through a variety of race-neutral programs designed to ease racial tensions (such as "symposia, student activities and services and university sponsored commemorations of the Civil Rights Movement and its leaders"). *Knight*, 14 F.3d at 1553. Since the Eleventh Circuit believed that Alabama could not be required to do more than it was doing to ease racial tensions, it clearly would not have condoned use of race-exclusive remedies (such as the Banneker Program) as a "narrowly tailored" means of achieving that goal.

warranted "policies and practices traceable to its prior system that continue to have segregative effects." Id.[8]

The instant case is factually distinguishable from *Fordice* in one respect: *Fordice* addressed the steps constitutionally *required* of a state in dismantling a segregated higher education system, while this case concerns the propriety of "remedial" actions *voluntarily* undertaken by UMCP. *Croson* makes clear, however, that that distinction is of little moment. A state may implement a voluntary race-based "remedial" program only if there exists a "strong basis in evidence" that remedial action is constitutionally required and only if the program is narrowly tailored to achieving its remedial goals. *Croson*, 488 U.S. at 507-508. Petitioners cannot begin to make the showing required under *Croson* in the absence of any evidence of the types of "policies" or "practices" identified in *Fordice*.

In light of *Fordice*, there is no basis for challenging the appeals court's holding that two of the four alleged continuing effects of past UMCP discrimination -- UMCP's allegedly poor reputation within Maryland's African American population and its allegedly racially hostile campus climate -- are insufficient as a matter of law to justify a race-based remedial program. As the appeals court noted (Pet. App. 10a), it will always be a historical fact that UMCP discriminated against blacks prior to 1954; thus, there is no way that UMCP can "remedy" knowledge of that fact other than to erase history. If a black Maryland high school senior chooses not to attend UMCP because he/she wishes not to be associated with a school that used to exclude blacks 40 years ago, that is an individual choice that is beyond UMCP's control. Certainly, nothing in the record suggests that UMCP has any

---

[8] *See also Bazemore v. Friday*, 478 U.S. 385, 387-88 (1986)(4-H and Homemaker Clubs, which rely solely on voluntary choices of individuals in obtaining members, have taken sufficient remedial action to remove all vestige of the formerly segregated club operations when they implement "voluntary choice" membership policies).

"policies" or "practices" that foster increased public awareness of UMCP's segregated past.[9]

Case law cited by Petitioners stands for the proposition that, in the period immediately after racial exclusion is ended, race-conscious remedies may be warranted in order to overcome reputational barriers that otherwise would discourage blacks from applying for positions they affirmatively seek. *See, e.g., Sheet Metal Workers v. EEOC*, 478 U.S. 421, 477 (1986) (plurality opinion).[10] Nothing in *Sheet Metal Workers* stands for the proposition that such remedies are warranted -- 40 years after racial discrimination has ended -- for the purpose of attracting black applicants to a school which they otherwise might not have considered attending. Moreover, the federal courts of appeals are unanimous in rejecting evidence of a reputation for discrimination in the distant past as sufficient justification for a race-based remedial program. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994); *Hammon v. Barry*, 813 F.2d 412 (D.C. Cir. 1987), *reh. denied*, 826 F.2d 73, 76-77 (D.C. Cir.), *cert. denied*, 486 U.S 1036 (1988).

The appeals court's refusal to consider evidence regarding the allegedly hostile racial climate at UMCP is

---

[9] There is also no evidence that UMCP has "policies and practices traceable to its prior [segregated] system" that cause the alleged underrepresentation of blacks or UMCP's black/white retention rate differential.

[10] The *Sheet Metal Workers* plurality permitted race-based remedies for racial discrimination that ended in the immediate past because, in the absence of race-based remedies, blacks who wished to become union members would have faced impediments in simply gaining access to the membership-signup process, and would have been "discourage[d] . . . from even applying for membership" based on a belief that any application would be rejected for racially discriminatory reasons. *Id.* In contrast, Petitioners have presented no evidence that black Marylanders believe that UMCP still discriminates against blacks in the admissions process.

similarly unobjectionable. There is no allegation that the allegedly hostile climate is fostered in any way by policies or practices of UMCP's administration; in the absence of such an allegation, *Fordice* counsels that UMCP has no interest in altering that climate sufficiently compelling so as to justify a race-exclusive remedy. *Fordice*, 112 S. Ct. at 2736-37. As the lower court noted, to permit Petitioners to employ racially discriminatory remedies in order to counteract racial hostility allegedly perceived by African Americans at UMCP -- a hostility similar to that perceived by blacks nationwide, on and off college campuses[11] -- would amount to nothing more than employing race-based remedies to confront general societal discrimination. This Court has never permitted race-based remedies to be used for that purpose. *See, e.g., Wygant*, 476 U.S. at 276 (plurality opinion).

II. THE DECISION BELOW WAS FULLY CONSISTENT WITH CASE LAW REGARDING "NARROWLY TAILORED" REMEDIES

The court below directed entry of summary judgment for Mr. Podberesky on the ground that Petitioners had failed to meet their evidentiary burden of demonstrating that the Banneker Program was "narrowly tailored" to eliminating present effects of past racial discrimination at UMCP. Pet. App. 18a-28a. That holding was fully consistent with the evidence and this Court's case law.

In particular, the court below found the Banneker Program deficient due to Petitioners' failure to sufficiently consider race-neutral alternatives to the program. *Id.* at 27a. This Court has repeatedly emphasized the importance of limiting race-exclusive "remedies" to those few situations in which race-neutral alternatives are unavailable. *Croson*, 488 U.S. at 507; *United States v. Paradise*, 480 U.S. 148, 171-177 (1987)(plurality

---

[11] *See, e.g., Ayers v. Fordice*, No. 4:75CV009-B-O, ___ F. Supp. ___ (N.D. Miss. Mar. 7, 1995)(slip op. at 72).

opinion). As the Fourth Circuit recently held, in the context of the City of Charlotte police department's race-based promotion program:

> The essence of the "narrowly tailored" inquiry is the notion that explicit racial preferences, if available at all, must be only a "last resort" option. Without evidence that the City considered race-neutral alternatives to achieve diversity, or that the use of a nondiscriminatory policy would not achieve its goal, we simply cannot hold that the City's promotion policy was narrowly tailored.

Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993). *Hayes* explained that any race-preference policy not adopted as a "last resort" is improper, regardless that the burden imposed on third parties by the preference policy might not be large. *Id.*

Each of the goals that Petitioners sought to achieve through the Banneker Program could have been achieved by race-neutral means. If the alleged "present effect" of past discrimination is a negative reputation of UMCP among Maryland blacks, then there are a whole host of race-neutral, public relations-oriented means of counteracting that reputation. Moreover, programs that discriminate on their face on the basis of race are unlikely to be effective in convincing blacks that UMCP has eliminated racial discrimination.

If the alleged "present effect" is the racial climate at UMCP, the narrowly tailored response would be a race-neutral campus program designed to reduce and address "racial incidents" on campus and to promote understanding among students of different races. The Banneker Program -- by stigmatizing blacks and promoting resentment among nonblack students (*see, e.g.*, J.A. 2979) -- has precisely the wrong effect. As Justice Powell recognized in *Bakke*:

> All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be

> viewed with deep resentment by the individuals burdened. . . One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies a system of allocating benefits and privileges on the basis of skin color and ethnic origin.

Bakke, 438 U.S. at 294 n.34 (Powell, J.).[12]

If the alleged "present effect" is lower retention and graduation rates at UMCP for blacks than for whites, then the narrowly tailored (and only effective) remedy is to eliminate the causes of the conditions that lead to the lower rates, including lack of finances to continue in college and academic difficulties. Such a remedy would entail awarding need-based scholarships to those successfully pursuing a college education, and devoting additional funds to tutoring and counseling.[13] The non-need-based Banneker Program does neither. It may attract academically talented (usually middle or upper class) black students who are likely to graduate from whatever college they attend, but any resulting increase in UMCP graduation and retention rates would be no more than window dressing for the school; it would be unrelated to UMCP's current (allegedly) low graduation and retention rates among blacks.

Even within the context of merit-based scholarship programs, there are more narrowly tailored alternatives to

---

[12] To the extent that black enrollment at UMCP is a function of its reputation and racial climate, implementing the race-neutral steps outlined above for improving UMCP's reputation and climate would also remedy any alleged "underrepresentation" of blacks at UMCP.

[13] As the Fourth Circuit recognized, the evidence demonstrated that the factors most likely to lead to students dropping out of UMCP were: (1) living off campus with a long commute; (2) having a job with long hours; and (3) having to provide one's own living expenses. Pet. App. 26a. When those factors are controlled for, the attrition rate is no higher for blacks than for whites. *Id.*

the Banneker Program.[14] Indeed, following the Fourth Circuit's ruling in this case, UMCP was able to identify a significant number of high-achieving African Americans to whom to award merit-based scholarships even though it no longer sets aside scholarships exclusively for members of one race.[15] A race-exclusive Banneker Program is constitutionally indefensible in light of UMCP's demonstrated ability to accomplish its allegedly remedial goals without resort to racial set-asides.

The Fourth Circuit rightly faulted the Banneker Program for its sole focus on high-achieving black students. Pet. App. 20a. The evidence is uncontested that UMCP has not discriminated in any way against the past two generations of black high school students. Moreover, the evidence indicates that high achievers, whether African Americans or not, experience high retention and graduation rates at UMCP. Accordingly, even if lower graduation rates among black Marylanders at UMCP were found

---

[14] Administrative inconvenience was the only reason given by UMCP for not implementing a race-neutral academic scholarship program that takes into account a wide variety of academic factors -- but downplays reliance on GPAs and SAT scores, two areas in which the disparity between top black candidates and top white candidates is huge. J.A. 2893-94. But this Court has made clear that administrative inconvenience is not an adequate reason to reject a more narrowly tailored, race-neutral remedy.

[15] Pending a final ruling from this Court, UMCP has combined its two merit-based scholarship programs into a new program called the Banneker-Key Scholarship Program. According to a recent issue of *The Diamondback*, UMCP's student newspaper, blacks constitute 40% of the 65 incoming freshmen awarded four-year Banneker-Key Scholarships in 1995. *See* "Banneker's future affected by many," *The Diamondback*, at 1 (April 13, 1995). In selecting Banneker-Key awardees, UMCP takes race into account as one factor among many for the purpose of obtaining a diverse group of awardees, but no scholarships are set aside exclusively for members of any racial group. *Id.* UMCP's ability to locate so many deserving, high-achieving black candidates without resorting to racial set-asides is particularly significant given that blacks constitute only about 15% of UMCP's applicant pool.

to be evidence that past discrimination is having a continuing effect, the Banneker Program does nothing to assist those suffering from the continuing effects and thus cannot be said to be narrowly tailored to remedying those effects.

Petitioners complain that the Fourth Circuit's ruling "conflicts with the well-settled principle that race-based relief may benefit 'individuals who were not the actual victims of a defendant's discriminatory practices.'" Kirwan Pet. at 21 (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986)). Petitioners err; there is no conflict. While a race-based remedial program will not automatically be held unconstitutional merely because the group benefited includes some who are not themselves the victims of past racial discrimination, the Court has made clear that a "narrowly tailored" remedy is one that "tailor[s] remedial relief to those who truly have suffered the effects of prior discrimination." *Croson*, 488 U.S. at 508. In this case, UMCP made no effort to tailor its remedy in that manner, but rather confined race-based benefits to those African Americans (predominantly high-achieving, middle or upper-income blacks) *least* likely to be suffering effects from UMCP's pre-1954 exclusion of blacks.[16]

Petitioners also argue that race-exclusive remedial programs are not even subject to a "narrowly tailoring" requirement when, as Petitioners contend is the case here, "the rights of third parties are not appreciably affected." Kirwan Pet. at 19. Petitioners are wrong on both the law and the facts. The Court has made clear that the Fourteenth Amendment requires *all* state action "that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling government interest" (*Shaw*, 113 S. Ct. at 2816), without

---

[16] African Americans living outside Maryland are also highly unlikely to be suffering effects from UMCP's pre-1954 exclusion of blacks; yet, in 1992 (the last year for which information is available in the record) 17 of 31 Banneker Scholarships went to nonresidents of Maryland, and scholarships have even been offered to noncitizens.

regard to the "burden or benefit" imposed thereby on members of various racial groups (*id.* at 2829).

Moreover, the evidence in this case establishes that Mr. Podberesky and others were substantially burdened by the race-exclusive nature of the Banneker Program. The Banneker Program provides an extremely valuable scholarship; it would have been worth about $35,000 to Mr. Podberesky over his four years at UMCP, and is now worth nearly $60,000 to students from outside Maryland. UMCP has all but conceded that Mr. Podberesky (in light of his stellar academic qualifications) would have been awarded a Banneker Scholarship had he been black instead of Hispanic. Accordingly, Mr. Podberesky's race-based exclusion from the Banneker Program -- a program that awarded about 50% of all academic scholarship funds offered by UMCP -- was no small matter. Furthermore, all UMCP students were substantially burdened by the Banneker Program, since its $1.2 million annual cost came directly from UMCP funds, funds that are raised in large measure through student tuition charges.[17]

Petitioners also insist that the Banneker Program is similar to "other race" scholarship programs operated in other states,[18] and that the Court should grant review because the Fourth Circuit's decision calls into question the constitutionality of all such programs. Greene Pet. at 23-24. Petitioners' claim is false; the Banneker Program

---

[17] Petitioners' claims that Banneker Program funds make up a small fraction of all financial aid at UMCP fail to point out that the vast majority of that aid is provided by the federal government and is need-based. If such aid and athletic scholarships are not considered, the Banneker Program accounts for a significant percentage of scholarship outlays by UMCP.

[18] An "other race" scholarship program is one that makes financial aid available to students without regard to race, provided only that the student use the funds at a school where a majority of students are of another race. Thus, whites could use "other race" grants only at Historically Black Institutions (HBIs), and blacks could use "other race" grants only at Historically White Institutions (HWIs).

is not an "other race" scholarship program as that term is commonly understood, and thus this case does not provide an opportunity for the Court to decide whether such programs can withstand Fourteenth Amendment scrutiny.

We note initially that although the State of Maryland appears to operate an "other race" program, the record indicates that UMCP does not obtain any funding under that program for Banneker Scholarships, but rather finances the Banneker Program from general operating funds. Moreover, an "other race" program cannot pretend to qualify as race-neutral unless all students have an equal opportunity to compete for available funds without regard to their race. That result can only be achieved if funding is awarded on a state-wide basis. The UMCP-funded Banneker Program does not meet that requirement. In failing to consider Mr. Podberesky for a Banneker Scholarship, UMCP denied him the chance to compete for one of about 30 four-year, all-expenses-paid grants worth about $35,000 each -- a scholarship opportunity that is without parallel at any of Maryland's four HBIs.

In sum, the Fourth Circuit's finding that the Banneker Program is not "narrowly tailored" is fully consistent with this Court's case law.

III. THE DECISION BELOW DOES NOT CONFLICT WITH ANY RECENT APPELLATE DECISIONS

Petitioners contend that the decision below conflicts with several other federal appellate decisions. Other than the inconsequential conflict with *dicta* from an Eleventh Circuit decision cited in Note 7, that simply is not true.

Mr. Podberesky notes initially that most of the other appellate decisions upon which Petitioners rely did not arise within the context of higher education. A determination regarding whether a racial preference can withstand strict scrutiny is, of necessity, highly fact specific; thus, it is somewhat disingenuous to assert that the Fourth Cir-

cuit's holding "conflicts" with decisions that did not even arise within a similar factual setting.

Petitioners cite two employment discrimination decisions (both more than two decades old) for the proposition that race-exclusive remedies are justified for the purpose of eliminating an employer's "poor reputation in the black community." Kirwan Pet. 24-25. *See Murrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.)(en banc), *cert. denied*, 419 U.S. 895 (1974); *Carter v. Gallagher*, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Neither decision conflicts with the decision below. *Murrow* and *Carter* presage *Sheet Metal Workers* in holding that, in the immediate aftermath of the elimination of rules barring employment of blacks, race-conscious remedies may be warranted in order to overcome reputational barriers that otherwise would discourage qualified blacks from applying for jobs because they assume their applications would not be considered.

Neither *Carter* nor *Morrow* suggests that race-conscious remedies may be continued *indefinitely* for the purpose of overcoming reputational barriers.[19] Moreover, the reputational barriers at issue in those cases are not at all similar to the reputational "barriers" relied on by Petitioners. There is no allegation in this case that Maryland blacks are reluctant to apply to UMCP because they perceive that their applications will not be considered fairly.[20] Rather, Petitioners allege that some Maryland

---

[19] *Carter* and *Morrow* are fully consistent with more recent case law that questions whether courts should ever attempt to trace a causal relationship between racially discriminatory acts in the distant past and alleged present effects of those acts. *See, e.g., Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir.1993), *cert. denied*, 114 S. Ct. 1190 (1994).

[20] Indeed, such a perception would be surprising, because the evidence demonstrates that blacks are afforded a tremendous preference in the UMCP admission process. For example, in 1990, 108 of 204 blacks (53%) with SAT scores between 750 and 800 were admitted, (continued...)

blacks are reluctant to attend UMCP because it used to exclude blacks and because they might not feel comfortable attending a school whose student body is overwhelmingly white. Nothing in *Carter* or *Murrow* supports use of race-exclusive remedies as a means of overcoming that sort of reputational "barrier."

Petitioners also allege that, in contrast to the court below, "the Eighth, Eleventh, and Sixth Circuits have upheld the validity of race-based remedial action implemented under circumstances virtually identical to those under which the Banneker Program arose." Kirwan Pet. 26. None of the three decisions cited by Petitioners (which pre-dated *Fordice, Croson,* and other landmark Supreme Court decisions regarding race-based remedial action) conflict with the Fourth Circuit's decision. In *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), the Sixth Circuit upheld a consent decree mandating race-conscious remedial action in Tennessee's higher education system. The procedural posture of that case serves to distinguish it; it involved the validity of a consent decree, an issue not present here. The Sixth Circuit based its decision in part on an unwillingness to overturn a settlement supported by all parties after 16 years of litigation (*Geier*, 801 F.2d at 809) and in part on its deference to detailed district court factual findings that identifiable vestiges of past discrimination remained within the Tennessee university system.[21] Moreover, the Sixth Circuit's later decision in *Brunet* makes clear that *Geier* should not

---

[20] (...continued)
while only 10 of 197 whites (5%) with SAT scores in the same range were admitted. In the same year, 292 of 488 blacks (60%) with GPAs between 2.00 and 2.49 were admitted, while only 531 of 1803 whites (29%) with GPAs in the same range were admitted. J.A. 530.

[21] The Sixth Circuit's decision was also based on a holding that higher education desegregation litigation was controlled by *Green* and other Supreme Court case law addressing desegregation of elementary and secondary schools. *Id.* at 804. This Court's subsequent decision in *Fordice* makes clear that the Sixth Circuit erred in that respect.

be read as countenancing race-conscious action designed to "remedy" racial discrimination in the distant past.

The Eighth Circuit's decision in *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981), is also factually distinguishable. *Valentine*, an employment discrimination case, involved a challenge by a white employee to an affirmative action hiring plan adopted by Arkansas State University shortly after OCR made informal determinations that vestiges of discrimination existed within Arkansas's higher education system. The Eighth Circuit upheld the plan, based in large part on its finding that a prior D.C. Circuit decision had found recent Title VI violations within Arkansas's higher education system.[22] *Valentine* lends no support to Petitioners' claims that 25-year-old OCR discrimination charges are sufficient to justify present-day remedial measures.

Palmer v. District Board of Trustees of St. Petersburg Junior College, 748 F.2d 595 (11th Cir. 1984), is the other federal appellate decision alleged by Petitioners to conflict with the Fourth Circuit's decision. *Palmer* is an employment discrimination case with very little factual similarity to the instant case. Indeed, the white plaintiff in that case stipulated that his employer's affirmative action hiring plan was "valid," and thus the Eleventh Circuit declined to address that question. *Palmer*, 748 F.2d at 600-601. In subsequent employment discrimination litigation, the Eleventh Circuit has subjected race-based "remedial" action to the same exacting scrutiny that the Fourth Circuit applied here. *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *In re Birmingham Re-*

---

[22] In fact, the Eighth Circuit misread the D.C. Circuit decision, *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)(*en banc*). *Adams* had made no finding one way or the other regarding Title VI violations in Arkansas; indeed, Arkansas was not even a party to the *Adams* litigation. Nonetheless, since the holding in *Valentine* is based on the erroneous finding that the D.C. Circuit had found Arkansas to be in violation of Title VI, the presence of that finding distinguishes *Valentine* from the instant case.

verse Discrimination Employment Litigation, 20 F.3d 1525 (11th Cir. 1994), *cert. denied sub nom., Martin v. Wilks*, ___ U.S. ___, 63 U.S.L.W. 3754 (April 17, 1995).

Petitioners also contend that the Fourth Circuit's decision is inconsistent with the U.S. Department of Education's (DOE) policy guidance regarding the application of Title VI to race-based college scholarships. *See* 59 Fed. Reg. 8956 (Feb. 23, 1994). That document speaks in generalities and does not indicate whether DOE believes that Title VI permits creation of a race-exclusive scholarship program given the factual record in this case. Any inconsistency between the DOE policy guidance (which purports to interpret existing law) and the Fourth Circuit's decision provides no basis for granting the Petition (S. Ct. R. 10.1); it would be merely an indication that the policy guidance is in need of revision.

Furthermore, DOE's interpretation of Title VI is of no relevance to two of Mr. Podberesky's three claims -- those arising under the Equal Protection Clause and 42 U.S.C. § 1981. Nor is DOE's interpretation of Title VI entitled to deference from the courts. The Court has held that the proscriptions of Title VI are largely coterminous with the proscriptions of the Equal Protection Clause with respect to the activities of a state or its agencies. *Fordice*, 112 S. Ct. at 2737-38 n.7; *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 463 U.S. 582, 590 (1983). Since a federal agency's interpretation of the Constitution is not entitled to deference from the courts (*Weinberger v. Salfi*, 422 U.S. 749 (1975)), there is no justification for courts to defer to a federal agency's interpretation of a statute that is coterminous with the Constitution.

IV. PETITIONERS HAVE NOT PROPERLY RAISED THE "DIVERSITY" ISSUE

The Kirwan Petitioners also seek review of the Fourth Circuit's decision based on their claim that the Banneker Program served UMCP's compelling interest in a racially

diverse student body. Kirwan Pet. 27-30. The "diversity" issue was not passed on by the Fourth Circuit and is not properly before the Court.

When Mr. Podberesky first sought summary judgment from the district court in 1991, the Kirwan Petitioners did not seek to defend the Banneker Program based on a "diversity" rationale. Rather, their sole defense was that the program was designed to overcome the effects of past UMCP racial discrimination. It was only after Mr. Podberesky appealed from the denial of his motion that UMCP for the first time raised the "diversity" rationale as an alternative defense. Accordingly, when the Fourth Circuit remanded the case to the district court in January 1992 for reconsideration of Mr. Podberesky's summary judgment motion, it quite rightly limited the remand to consideration of the "remedying past discrimination" defense. Pet. App. 107a-108a. Fed. R. Civ. P. 56 demands no less; a party that defends against a summary judgment motion based on one rationale may not avoid entry of judgment by raising an entirely new rationale after the initial rationale is rejected.

Were the Court nonetheless to agree to consider Petitioners' "diversity" defense, it would be forced to do so with very little guidance; none of the lower courts that have reviewed this case have passed directly on the "diversity" issue.[23] An issue raising such important constitutional questions (and which has not been directly addressed by the Court since its fractured decision in *Bakke* in 1978) should not be decided on such a thin record.

Moreover, the record is clear that a desire for "diversity" played no role in creation of the Banneker

---

[23] Petitioners have only themselves to blame for that state of affairs. Even when the case came before the Fourth Circuit for the second time, Petitioners sought to avoid a ruling on the "diversity" issue. Rather, Petitioners advised the appeals court that should it reverse the district court, it should remand the case for consideration of the "diversity" issue in the first instance by the district court.

Program in 1978 and in its continuation in 1990 at the time that Mr. Podberesky sought to be considered for a scholarship.[24] "Diversity" only arose as an issue in response to this lawsuit. When a racial classification is challenged, a state may not defend its conduct based on just any rationale it can divine during litigation. Rather, the rationale advanced must be one that actually led to creation of the program. *Coral Construction Co. v. King County*, 941 F.2d 910, 920 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992). Accordingly, while Petitioners are entitled to defend a new race-based scholarship program on a "diversity" rationale, they may not resist Mr. Podberesky's claims based on a rationale for the Banneker Program invented after suit was filed.

CONCLUSION

Respondent Daniel J. Podberesky respectfully requests that the Court deny the petitions for certiorari.

Respectfully submitted,

SAMUEL PODBERESKY
253 Milthorn Court
Riva, MD 21140
(410) 269-1635

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for Respondent

Dated: May 1, 1995

---

[24] Indeed, Petitioner Kirwan stated earlier this month, "In neither scholarship program before [consolidation of the Banneker and Key programs] was diversity a specific [selection] criterion because the Banneker was for African Americans and the students getting the Key Scholarship have been a quite diverse group of people. . . . It was only when we combined the two pools that we have diversity as a criterion." *See* "Banneker's future affected by many," *The Diamondback* at 1 (April 13, 1995).

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

Nos. 91-1620, 91-1621

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM E. KIRWAN, *et al.*,
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, ET AL. IN SUPPORT OF PETITIONER

MARCIA GREENBERGER
VERNA L. WILLIAMS
NATIONAL WOMEN'S LAW CENTER
1616 P Street, N.W.
Washington, D.C. 20036
(202) 328-5160

DAVID H. COBURN
Counsel of Record
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae
National Women's Law Center, et al.

May 1, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
ARGUMENT	2
I. THE HISTORY OF DISCRIMINATION AGAINST WOMEN IN HIGHER EDUCATION IS LONG AND PERVASIVE	6
II. THE HISTORICAL DISCRIMINATION AGAINST WOMEN IN HIGHER EDUCATION HAS GENERATED PRESENT EFFECTS THAT WARRANT REMEDIAL MEASURES	9
III. AN EXTENSIVE NETWORK OF GENDER-BASED PROGRAMS HAS BEEN ESTABLISHED TO ERADICATE THE EFFECTS OF PAST DISCRIMINATORY PRACTICES AND PREJUDICES	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Brown v. Board of Education, 349 U.S. 294 (1955) 3
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 3
Frontiero v. Richardson, 411 U.S. 677 (1973) 5
Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968) 2
J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994) 6
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 6
Podberesky v. Kirwan, 838 F. Supp. 1075 (D. Md. 1993), *rev'd*, 38 F.3d 147 (4th Cir. 1994) 4
Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994) 2, 4
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 6
Sharif v. N.Y. State Educ. Dept., 709 F. Supp. 364 (S.D.N.Y. 1989) 10
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 2
United States v. Fordice, 112 S. Ct. 2727 (1992) 2
United States v. Paradise, 480 U.S. 149 (1987) 3
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 3, 4

STATUTES & REGULATIONS

20 U.S.C. §§ 1681-1688 ..... 6, 10
34 C.F.R. § 106.3 6
34 C.F.R. § 106.37(b) 11

FEDERAL REGISTER

U.S. Dept. of Educ., *Nondiscrimination in Federally Assisted Programs*, 49 Fed. Reg. 8756 (1994) 4

MISCELLANEOUS

American Association of University Women, *How Schools Shortchange Girls* (1992) 9

TABLE OF AUTHORITIES—Continued

Page

American Council on Education, *Increase of Women Majoring in Nontraditional Fields Slows Dramatically*, About Women on Campus (Fall 1994) 10

American Council on Education, *Minorities in Higher Education 1994, 13th Annual Report* (Mar. 1995) 9

Katherine Conner & Ellen Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 Berkeley Women's L.J. 13 (1992) 10

Mary Moran, *Student Financial Aid and Women: Equity Dilemma?* (Jonathan D. Fife ed. 1986) 10

Gayle Schlacter, *Directory of Financial Aids for Women 1995-1997* (1994) 12, 13

Barbara M. Solomon, *In the Company of Educated Women* (1985) 7, 8

Task Force on Women in Higher Education, *Women in Academe: Progress and Prospects* (Mariam K. Chamberlain ed. 1988) 7, 8

U.S. Dept. of Educ., *National Center for Education Statistics: Digest of Education Statistics 1994* 9

Kenneth L. Wilson & Janet P. Boldizar, *Gender Segregation in Higher Education: Effects of Aspirations, Mathematics Achievement, and Income*, 63 Soc. Educ. 62 (Jan. 1990) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1620

WILLIAM E. KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

No. 94-1621

MONICA GREENE, *et al.*
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, ET AL. IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici Curiae are 11 women's rights and civil rights organizations sharing a strong commitment to the protection of the rights of women and the elimination of unlawful discrimination against women.[1] They litigate and

[1] The parties have consented to the filing of this brief. Their consent letters have been filed with the Clerk.

educate the public to secure equal rights for women in all aspects of American life, including higher education. Individual statements of interest of the *amici* are reproduced in the Appendix.

The decision of the court of appeals, *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), is of far-reaching significance because it threatens the broad array of financial assistance now offered to thousands of women students nationwide as a means of redressing the effects of past discrimination in higher education. Such programs exist because, as public and private entities have recognized, the elimination of the persistent effects of historical discrimination against women requires ameliorative measures. For women of color, particularly African-American women, these programs are especially critical because the opportunities for them to pursue higher education have been severely restricted by the combination of discrimination based on gender and on race.

ARGUMENT

In the decision below, the court of appeals held that the University of Maryland at College Park ("UMCP") may not maintain a race-based scholarship program that UMCP officials have concluded is necessary to ameliorate the lingering vestiges of the state's long history of discrimination against African-Americans in higher education. In so holding, the court of appeals ignored this Court's recent decision in *United States v. Fordice*, 112 S. Ct. 2727 (1992), which confirmed that a state that once maintained a dual system of education *de jure* has a "constitutional duty to dismantle the dual school system that its laws once mandated." 112 S. Ct. at 2735. The Court in *Fordice* made clear that "this obligation applies to [the state's] higher education system," as well as to its primary and secondary schools. *Id.; see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Green v. County School Bd. of New Kent*

County, 391 U.S. 430, 437-38 (1968); *Brown v. Board of Education*, 349 U.S. 294 (1955).

Instead of focusing on the case law involving institutions that have engaged in unlawful discrimination in the past, the court of appeals relied on decisions assessing the validity of race-conscious programs voluntarily adopted by public employers in the absence of any findings of past discrimination. *E.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). *Wygant* and *Croson* are clearly distinguishable from this case for at least one reason: no one disputes that UMCP discriminated against African-Americans for many years.[2] Indeed, under such circumstances, the Court has recognized a "constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Wygant*, 476 U.S. at 291 (O'Connor, concurring) (citing *Swann*) (emphasis in original). *See also United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion) (upholding race-conscious relief imposed to remedy "the pervasive, systematic, and obstinate discriminatory conduct" of the public employer).

That UMCP has not been adjudged by a court to be in violation of the Constitution is of no moment. Surely, a public institution need not wait until it is subject to the contempt power of a federal court before it implements remedial action to redress the effects of its own past wrongs. UMCP's desegregation plan, of which the challenged Banneker Scholarship program is an important component, was developed in response to ongoing pressure from the Department of Education's Office of Civil

---

[2] The history of discrimination at UMCP is set out in the Petitions and will not be repeated here. *See* Petition for a Writ of Certiorari, *Kirwan v. Podberesky*, No. 94-1620 ("Kirwan Pet.") at 6-11; Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, *Greene v. Podberesky*, No. 94-1621 ("Greene Pet.") at 3-6.

Rights, which has yet to approve the University's efforts to desegregate. *See* Kirwan Pet. at 8-11. And the University itself engaged in extensive administrative fact-finding that confirmed the need for and the efficacy of the Banneker program. *Id.* at 4.

In these circumstances the court of appeals erred in failing to uphold the University's decision to retain the Banneker program. *See Wygant*, 476 U.S. at 277 (in assessing a claim of reverse discrimination, "the trial court must make a factual determination that *the employer* had a strong basis in evidence for *its* conclusion that remedial action was necessary") (emphasis added); U.S. Dept. of Educ., *Nondiscrimination in Federally Assisted Programs*, 59 Fed. Reg. 8756, 8757 (1994) (a finding by "a court or an administrative agency—such as the Department's Office of Civil Rights"—that race-conscious relief is necessary to "overcome the effects of past discrimination" justifies such relief, as does a "strong basis in evidence" that such relief is necessary, absent a formal finding).[3]

Amici submit that the failure of the court of appeals to give proper weight to the history of race discrimination in assessing the Banneker program casts a shadow on the continued viability of gender-based scholarships designed to remedy historical discrimination faced by women in higher education. To a large extent, the history of discrimination against women in higher education,

---

[3] It seems that in this case the district court and the court of appeals used different approaches. The district court appears to have evaluated the University's findings based on the adequacy of the record that the University had assembled. *See* 838 F. Supp. at 1083 ("I am of the view that all four of UMCP's findings [of present effects of past discrimination] are supported by strong evidence."). The court of appeals, on the other hand, examined the evidence itself and concluded that disputed issues of material fact precluded summary judgment in favor of UMCP. 38 F.3d at 157. The district court's approach is more consistent with this Court's jurisprudence. *See Wygant*, 476 U.S. at 277.

as in other fields, mirrors the discrimination against African-Americans that the Banneker program was intended to redress. This Court has recognized the common characteristics of the nature and impact of race and gender discrimination.

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

The roots of sex discrimination run just as deep in the realm of higher education as they do in other areas. Women were denied access to the most prestigious American universities well into the 1950's, and the historical limitations placed on the fields of study open to women continue to have effects today in areas such as engineering and mathematics, where women continue to be underrepresented. An extensive network of gender-based scholarships and other gender-based programs has emerged to redress the legacies of this past discrimination.

The decision below is so expansive that, at the very least, educational authorities, both public and private, could well be reluctant to continue to use gender-based

scholarships for fear of provoking a legal challenge.[4] The chilling effect that that decision will have on such scholarships threatens to reverse the positive impact that such scholarships have had in eradicating the present effects of past discrimination against women.[5] This Court thus should grant the petitions for certiorari and reverse the decision of the court of appeals because of its far-reaching implications.

I. THE HISTORY OF DISCRIMINATION AGAINST WOMEN IN HIGHER EDUCATION IS LONG AND PERVASIVE

Discrimination against women in higher education initially took the form of outright exclusion. Once colleges and universities began admitting women, a variety of measures were used to limit their participation. These practices have had the effect of steering women away from

---

[4] *Amici* recognize that, under this Court's jurisprudence to date, the standards governing the constitutionality of race-based classifications are different from those governing gender-based classifications. *See, e.g., Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (applying strict scrutiny for race based classifications); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982) (applying "heightened scrutiny" to gender-based classifications); *J.E.B v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1426 n.6. (1994) (reserving the question of whether strict scrutiny should apply to gender discrimination). While these different standards might have supported a different result below had this been a case involving a gender-based scholarship program, it is questionable whether government or private scholarship sponsors would assume the risk of litigation by retaining either gender- or race-based scholarship programs were the decision below allowed to stand.

[5] Department of Education regulations implementing Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, permit the use of affirmative actions, such as scholarships, to "overcome the effects of conditions which resulted in limited participation . . . by persons of a particular sex." 34 C.F.R. § 106.3. The court of appeals decision, if allowed to stand, would cause questions to arise about the validity of this regulation.

the traditionally male-dominated fields and into lower paying occupations. Although women continue to be underrepresented in such fields, programs targeting women have had a significant impact in reversing this trend.

The discrimination against women in higher education began with the founding of the first American institution of higher education. In 1636, Harvard College opened for men only. Not until 1943 did Harvard admit its first female student.[6] Princeton and Yale Universities did not allow women to enroll until as recently as 1969.[7] Women's progress at state universities tended to be more rapid, but was not uniform. While the University of Iowa accepted women beginning in 1855, the University of Virginia did not permit women to enroll until 1970.[8]

Indeed, early advances by women in higher education were neither uniform nor consistent, since women's progress remained captive to prevailing social mores. Concerns that women distracted men in the classroom, or conversely deterred men from taking certain classes, led many educational institutions to limit the scope of coeducation. Some colleges and universities enforced strict limitations on the number of women permitted to be enrolled each year.[9]

Other institutions limited the presence of women on campuses by demanding stronger qualifications of women than of men. For example, higher test scores and grade point averages were the necessary prerequisites for the

---

[6] Barbara M. Solomon, *In the Company of Educated Women* 188 (1985).

[7] Task Force on Women in Higher Education, *Women in Academe: Progress and Prospects* 359 (Mariam K. Chamberlain ed. 1988).

[8] Solomon, *supra* note 6, at 56.

[9] Stanford University, for example, admitted only one woman student for every three men. Chamberlain, *supra* note 7, at 5.

admission of women at both the University of Michigan and Cornell University.[10] As recently as 1970, the University of North Carolina's admissions policy explicitly stated that the "admission of women on the freshmen level will be restricted to those who are exceptionally well qualified." [11]

Women also faced discriminatory hurdles to obtaining financial assistance. At Columbia University, for instance, the largest fellowships were reserved for men. And among the smaller fellowship awards, women were eligible for only four out of a total of thirty-two.[12]

Although the enrollment of women in colleges increased throughout the early 1900's, discriminatory stereotypes and prejudices profoundly affected their choice of study and pursuit of recreational activities. Women were expressly denied entrance to fields of study that were considered exclusively male provinces. For example, Harvard did not admit women to its medical school until 1945, to its law school until 1950, and to its business school until 1963.[13] Instead, women were steered into teaching and nursing-related professions. As a result of these discriminatory practices and stereotypes, the majority of women who earned bachelors degrees entered teaching or nursing-related professions until as recently as the 1970's.[14]

Thus, discrimination against women in this country's institutions of higher learning has been profound. As is true of racial discrimination, the effects of this long history of discrimination against women continue to be felt today.

---

[10] Chamberlain, *supra* note 7, at 209.

[11] *Id.* at 18 (quoting statement of the University of North Carolina).

[12] Solomon, *supra* note 6, at 136.

[13] Chamberlain, *supra* note 7, at 359.

[14] Solomon, *supra* note 6, at 126.

II. THE HISTORICAL DISCRIMINATION AGAINST WOMEN IN HIGHER EDUCATION HAS GENERATED PRESENT EFFECTS THAT WARRANT REMEDIAL MEASURES

The long tradition of discriminatory practices and prejudices continues to impact upon the range of opportunities available to women in higher education in a number of ways. Women lag behind men in degrees earned in nearly all "technical" fields, particularly math, science and engineering.[15] For example, in 1992 men earned 66,716 bachelors degrees in engineering or related fields. College women, on the other hand, earned only 10,825 of these degrees. The data are even more graphic for African-American and Latina women, who, in 1992, earned only 997 and 431 engineering degrees, respectively.[16] Similar results are found in comparisons of women and men in computer science and other scientific fields.[17]

The data on women earning advanced degrees in these historically male-dominated fields underscore the extent to which prior discrimination continues to affect the opportunities for women today. In the physical sciences, including chemistry and astrophysics, women earned only 962 doctorates in 1992, while men earned 3,429.[18] And

---

[15] U.S. Dept. of Educ., *National Center for Education Statistics: Digest of Education Statistics 1994* at 253 (Table 239); American Association of University Women, *How Schools Shortchange Girls* 24-29 (1992). The difficulty in entering math and science related professions is critical in terms of high school girls' future earning potential. Studies have shown that mathematics specialization is a critical determinant in income earning potential. *See* Kenneth L. Wilson & Janet P. Boldizar, *Gender Segregation in Higher Education: Effects of Aspirations, Mathematics Achievement, and Income*, 63 Soc. Educ. 62, 68 (Jan. 1990).

[16] American Council on Education, *Minorities in Higher Education 1994, 13th Annual Report* 78 (Table 14) (Mar. 1995).

[17] *Digest of Education Statistics*, *supra* note 15 at 252 (Table 239).

[18] *Id.* at 255 (Table 239).

even though the absolute number of women entering traditionally male-dominated fields has increased, the rate of growth appears to be slowing.[19]

The historical exclusion of women from these male-dominated fields of study, coupled with the overall discrimination women have encountered in education, also has resulted in the denial of access to critical financial assistance for higher education opportunities.[20] For example, one court has held that use of Scholastic Assessment Test ("SAT") scores, which typically are higher for boys than for girls, particularly in math,[21] as the sole determinant of state scholarship awards violates Title IX and the Equal Protection Clause of the Fourteenth Amendment. *Sharif v. N.Y. State Educ. Dept.*, 709 F. Supp. 364 (S.D.N.Y. 1989).[22]

Women also are denied access to an entire class of scholarships designated specifically for men, created with

---

[19] American Council on Education, *Increase of Women Majoring in Nontraditional Fields Slows Dramatically*, About Women on Campus, Fall 1994, at 11 (study conducted by University of Pennsylvania sociologist, Jerry A. Jacobs).

[20] This discrimination continues to exist despite the passage of Title IX in 1972. *See* 20 U.S.C. §§ 1681-1688 (prohibiting discrimination on the basis of sex "under any educational program or activity receiving Federal financial assistance" with certain exceptions).

[21] Mary Moran, *Student Financial Aid and Women: Equity Dilemma?* 17 (Jonathan D. Fife ed. 1986).

[22] Indeed, the use of standardized tests to determine allocation of educational benefits and scholarships has been challenged by scholars, *see, e.g.*, Katherine Conner & Ellen Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 Berkeley Women's L.J. 13 (1992), and recently at the Office of Civil Rights ("OCR") for the Department of Education, where the American Civil Liberties Union filed a complaint in February 1994 concerning the use of the Preliminary Scholastic Assessment Test ("PSAT") to determine scholarship eligibility. To date, OCR has not issued a finding in that case.

no remedial purpose whatsoever. Specifically, Title IX regulations permit scholarship programs

> established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided,* That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

34 C.F.R. § 106.37(b).[23] Thus, colleges and universities across this nation have provided scholarships and fellowships for "deserving" men planning to pursue careers in medicine,[24] male mechanical engineering students who are members of the Sigma Chi Fraternity,[25] men from New Jersey,[26] and men who attended certain high schools,[27] among others.[28] As this illustrative list demonstrates, not only do these targeted scholarships fail to evince a compensatory purpose, in some cases they encourage and facilitate male participation in fields where

---

[23] Surely, it would be unacceptable for the court of appeals decision, if permitted to stand, to allow the anomalous circumstance in which gender-based scholarships established to remedy past discrimination would be unlawful, while gender-specific scholarships created for men with no compensatory purpose would be permitted.

[24] George Groff and Margaret Groff Scholarship offered by Bucknell University.

[25] Lewis Frederick Lyne Jr., Mechanical Engineering Scholarship, offered by Bucknell University.

[26] The New Jersey Student Aid Fund, offered by Middlebury College.

[27] The Duncan School Memorial Scholarship, offered by Vanderbilt University.

[28] The University of Maryland also offers male residents of Baltimore City or Charles County financial aid through the Vivian F. Roby Fund.

men already have an advantage, such as science and engineering.

The continued disparate treatment of women and the lingering effects of discrimination in higher education that persist to this day warrant special attention on the part of school and government officials.

III. AN EXTENSIVE NETWORK OF GENDER-BASED PROGRAMS HAS BEEN ESTABLISHED TO ERADICATE THE EFFECTS OF PAST DISCRIMINATORY PRACTICES AND PREJUDICES

To remedy the persistent effects of discrimination against women in higher education, federal, state, local, and private entities have created an extensive network of gender-based scholarships.[29] By targeting women for financial assistance, these scholarships serve to ameliorate some of the discrepancies in financial assistance that have been caused by past discrimination. Moreover, the majority of these scholarships provide funds specifically to support women interested in pursuing historically male-dominated fields, thus further addressing some of the most pernicious effects of prior discrimination. Under the ruling below, however, these scholarships could be jeopardized.

Scholarship opportunities for women range in scope from awards to encourage women to pursue careers in journalism[30] and helicopter piloting[31] to fostering interest in science and engineering.[32] At the federal level, the

---

[29] According to one source, well over 1,000 scholarships are primarily or exclusively targeted for women. Gayle Schlacter, *Directory of Financial Aids for Women 1995-1997* (1994).

[30] *Id.* at 36 (Helen Miller Malloch Scholarship).

[31] *Id.* at 116 (Doris Mullen Memorial Scholarship).

[32] *E.g., id.* at 81 (Undergraduate Award for Excellence in Chemistry; Women in Engineering and Computer and Information Science Fellow).

Department of Education earmarks funds to educational institutions to enable them to identify, recruit, and make available direct financial aid to talented undergraduate women and minorities. This program provides funds to approximately seventy institutions that award roughly 1,200 individual grants annually.[33]

Similarly, several state entities have created scholarships that are specifically designed to address the underrepresentation of women in science, engineering, and other traditionally male-dominated fields of study. The Florida National Science Scholars Program and the New York Governors Committee on Scholastic Achievement provide just two examples of affirmative measures that states have taken to remedy the current imbalance between men and women in the sciences.[34]

Individual colleges and universities have also established scholarships exclusively for women.[35] The University of Maryland itself, for example, maintains seven scholarship programs that provide funds to women only. For example, the Mary Elizabeth Roby Fund provides funds to senior or graduate women enrolled in government and politics. The University also sponsors the Summer Study in Engineering for High School Women and the WM Summer Engineering Program, both of which provide assistance to high school girls.[36]

---

[33] *Id.* at 88 (Women and Minority Participation in Graduate Education Grant).

[34] *Id.* at 30.

[35] Even when women are not the exclusive recipients of financial assistance, they are often given particular consideration by grant makers. For example, all of the National Institutes of Health recruitment programs require women and minorities to be given special consideration.

[36] Memorandum to the National Women's Law Center from the University of Maryland, Office of the President, *Listing of Gender-Based Scholarships awarded by UMCP.*

While targeted gender-based scholarships currently address the impact of past discrimination, the persistent disparity in the participation of women in certain fields underscores the continued necessity for these programs. By threatening the ability of educational institutions to develop and maintain programs aimed at eliminating the continued effects of historical discrimination, the decision of the court of appeals jeopardizes the continued viability of these important efforts and thus warrants the attention of this Court.

CONCLUSION

For the reasons stated above and for the reasons set forth in the Petitions, the petitions for certiorari should be granted and the decision of the court of appeals reversed.

Respectfully submitted,

MARCIA GREENBERGER
VERNA L. WILLIAMS
NATIONAL WOMEN'S LAW CENTER
1616 P Street, N.W.
Washington, D.C. 20036
(202) 328-5160

DAVID H. COBURN
Counsel of Record
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for Amici Curiae
National Women's Law Center, et al.

May 1, 1995

APPENDIX

APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

National Women's Law Center

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's right to equal protection under the law. The NWLC is interested in this case because the decision of the court of appeals threatens the broad array of financial assistance offered to thousands of women students nationwide as a means of redressing the effects of past discrimination in higher education. It is necessary that these programs exist because the elimination of the persistent effects of historical discrimination against women requires ameliorative measures.

American Association of University Women

The 150,000 members of the American Association of University Women ("AAUW") are women and men with baccalaureate or higher degrees who work on behalf of education and equity for all women and girls. AAUW favors affirmative action measures that open previously closed doors in education and in the work place to women and members of racial/ethnic minority groups. The AAUW Educational Foundation is the largest private source of fellowships to support women pursuing advanced degrees.

Association for Women in Science

Founded in 1971, the Association for Women in Science ("AWIS") is a nonprofit organization dedicated

to equity and full participation for women in all areas of science and technology. AWIS is interested in this case because the decision of the court of appeals threatens financial assistance for women and minorities which has helped redress past discriminatory practices and prejudices to equal access to higher education. Because of outright exclusion and other discriminatory practices, women are underrepresented today in fields of math, science, and engineering. To remedy these persistent effects of discrimination in higher education, an extensive network of gender-based scholarships has been implemented. AWIS believes that the decision of the court of appeals threatens the continued viability of efforts to provide equal access and promote equal opportunities for women interested in pursuing careers in science and technology.

Center for Women Policy Studies

The Center for Women Policy Studies was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment and violence against women, work/family and "diversity" policies of employers, education, and other relevant issues.

National Association of Commissions for Women

The National Association of Commissions for Women ("NACW") is interested in this case because the decision below threatens the broad array of financial assistance offered to thousands of women students nationwide as a means of redressing the effects of past discrimination. These programs are necessary because the elimination of the persistent effects of historical discrimination against women requires remedial measures.

National Clearinghouse on Women's Issues

The National Clearinghouse on Women's Issues ("CWI"), a non-profit organization, was established over

twenty years ago for the purpose of exchanging and disseminating educational information on issues related to discrimination on the basis of race, sex, age, or marital status, placing particular emphasis on public policies affecting the economic and educational status of women. To carry out its mandate, the CWI takes action or positions on issues central to the well-being of women.

The Feminist Majority Foundation

Founded in 1987, the Feminist Majority Foundation is a § 501(c)(3) non-profit organization with offices in Arlington, Virginia, and Los Angeles, California. The Feminist Majority Foundation seeks to empower women through research, education, action, and other strategies that bring about women's equality.

The Feminist Majority Foundation believes that the Supreme Court of the United States should grant the petitions for writs of certiorari and further that the Supreme Court should overturn the decision of the U.S. Court of Appeals for the Fourth Circuit, erroneously holding that the University of Maryland at College Park ("UMCP") may not maintain a race-based scholarship program. The Feminist Majority Foundation believes that such programs are necessary to dismantle long-standing barriers to women's and minorities' equal educational opportunities.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity, such as sex discrim-

ination in employment and education. NOW LDEF was co-counsel in *Garrett v. Board of Education* and has appeared as *amicus* in numerous cases concerning programs designed to insure girls' and women's equal participation in education.

National Organization for Women, Inc.

The National Organization for Women ("NOW") is the largest feminist organization in the United States, with a membership of approximately 250,000 women and men in more than 600 chapters throughout the country. Since its founding in 1966, a major goal of NOW has been the eradication of sex discrimination in education and the elimination of barriers that deny women educational opportunities and the ability to become economically self-sufficient. NOW believes that educational equality is fundamental to women's ability to achieve equality in other aspects of society. In furthering its commitment to that goal, NOW has participated in numerous cases and commented on proposed legislation and regulations to insure full enforcement of laws prohibiting discrimination in education.

Women's International League for Peace and Freedom

The Women's International League for Peace and Freedom has since 1915 worked for the achievement by peaceful means of those political, social, economic, and psychological conditions throughout the world which can assure peace, freedom, and justice for all. Ensuring access to education, through scholarship programs which redress the effects of past discrimination based on gender and race, is a necessary step towards creating those conditions. As such, the Women's International League for Peace and Freedom finds the *Podberesky* case of crucial importance.

Women's Legal Defense Fund

Founded in 1971, the Women's Legal Defense Fund ("WLDF") is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The Fund has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of the antidiscrimination laws. WLDF has devoted significant resources to combatting sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the Supreme Court to advance women's opportunities in education.

No. 94-1620, No. 94-1621

Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM E. KIRWAN, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

MONICA GREENE, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AMERICAN ASSOCIATION OF DENTAL SCHOOLS, ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, ASSOCIATION OF AMERICAN UNIVERSITIES, ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES, ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, THE COLLEGE BOARD, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, LAW SCHOOL ADMISSION COUNCIL, NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION, NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, NATIONAL ASSOCIATION OF STUDENT FINANCIAL AID ADMINISTRATORS, AND NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS, IN SUPPORT OF PETITIONERS

Of Counsel:
SHELDON E. STEINBACH
General Counsel
American Council on Education
One Dupont Circle, Suite 800
Washington, D.C. 20036
(202) 939-9355

MARTIN MICHAELSON *
DANIEL B. KOHRMAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5748

* *Counsel of Record for Amici Curiae American Council on Education, et al.*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE COURT OF APPEALS DISREGARDED AMPLE EVIDENCE THAT MINORITY-TARGETED FINANCIAL AID PROGRAMS LIKE THE BANNEKER SCHOLARSHIPS ARE SMALL, UNIQUELY EFFECTIVE, AND TAILORED TO THE EDUCATIONAL NEEDS OF COLLEGES AND UNIVERSITIES THAT SPONSOR THEM, AND THUS ARE A MINIMALLY INTRUSIVE, VOLUNTARY MEANS TO LAWFUL ENDS	6
II. THE LEGAL STANDARDS EMBRACED BY THE COURT OF APPEALS WOULD RENDER IMPRACTICAL MANY GOOD FAITH EFFORTS, SUCH AS THE BANNEKER SCHOLARSHIPS, TO REMEDY VOLUNTARILY PAST DISCRIMINATION IN HIGHER EDUCATION	12
III. THE COURT OF APPEALS' IMPLICIT REJECTION OF DIVERSITY AS A LAWFUL RATIONALE FOR MINORITY-TARGETED FINANCIAL AID PROGRAMS WAS UNFOUNDED IN LAW OR FACT AND SHOULD BE VACATED	16
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Page

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 11, 12, 18
Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) .. 10
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 18
Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 11, 16-18
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 18
United States v. Paradise, 480 U.S. 149 (1987) 15, 18
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 11, 12, 18

Constitutional, Statutory, and Regulatory Provisions

U.S. Const. amend. I 18
U.S. Const. amend. XIV 16
Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d 10
Notice of Final Policy Guidance, 59 Fed. Reg. 8756 (February 23, 1994) 13, 19

Legislative Authorities

Department of Education's Race-Specific Scholarship Policy: Hearings before the Human Resources and Intergovernmental Relations Subcommittee of the Committee on Government Operations, House of Representatives, 102d Cong., 1st Sess. (1991) 8
H.R. Rep. No. 102-411, 102d Cong., 1st Sess. (1991) 13

Other Authorities

Bowen, William G., and Rudenstine, Neil L., *Colleges Must Have the Flexibility to Designate Financial Aid for Members of Minority Groups*, The Chronicle of Higher Education, January 9, 1991 9
Carter, Deborah J., and Wilson, Reginald, *Minorities in Higher Education, 1994 Thirteenth Annual Status Report* (American Council on Education 1995) 19

TABLE OF AUTHORITIES—Continued

Page

Letter from Robert H. Atwell, President, American Council on Education, to The Honorable Lamar Alexander, U.S. Secretary of Education (May 2, 1991) (transmitting report entitled *Minority-Designated Scholarship Programs, A Compilation of Available Data on the Scope and Extent of Programs*) 7, 8,10

Human Resources Division, U.S. Government Accounting Office, *Higher Education, Information on Minority-Targeted Scholarships* (1994) (GAO/HEHS-94-77) 7, 9-11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1620, No. 94-1621

WILLIAM E. KIRWAN, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

MONICA GREENE, *et al.*, *Petitioners*,

v.

DANIEL J. PODBERESKY, *Respondent*.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, *ET AL.*, IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

The *amici* are national organizations that represent public and independent higher education institutions. They share a vital interest in legal standards applicable to race-conscious programs in higher education, as well as a strong commitment to increasing the participation of minority students in American colleges and universities, including

---

[1] This brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk.

where opportunities for such students historically have been limited. *Amici* also strongly favor greater minority student participation in higher education to secure the educational benefits of diversity.

Amicus American Council on Education ("ACE"), founded in 1918, represents all sectors of American higher education on a nationwide basis. Its members consist of approximately 1700 institutions, including a substantial majority of public and private colleges and universities in the United States. The principal purpose of ACE is to further the goals of higher education, including the interests of component groups of the academic community: students, faculty, administration, and employees. Many of ACE's members either have or are considering minority-targeted financial aid programs, among other measures, to assure effective recruitment and retention of minority students. The other *amici* on this brief [2] collectively represent a very broad range of interests of the American higher education community.

---

[2] In addition to ACE, *amici* are the American Association of State Colleges and Universities (represents more than 370 state colleges and universities across the United States and in Puerto Rico, Guam, and the Virgin Islands); American Association of Dental Schools (represents all United States dental schools, and affiliated institutions); Association of American Law Schools (legal education's principal representative to the federal government and to other national higher education organizations and learned societies); Association of American Medical Colleges (composed of 126 medical schools, 405 teaching hospitals, 92 academic societies, and related organizations); Association of American Universities (56 public and independent American, and two Canadian, universities with strong programs of graduate and professional education and research); Association of Community College Trustees (represents governing boards of the more than 1300 community colleges throughout the United States and Canada); Association of Governing Boards of Universities and Colleges (represents 30,000 member trustees, presidents, and chancellors who serve 1700 public and independent colleges and universities); The College Board (association of nearly 3000 education organizations that focuses on facilitating the transition of students from school to college); Council

Amicus ACE had a major role in establishing the Commission on Minority Participation in Education and American Life, which was co-chaired by former Presidents Gerald Ford and Jimmy Carter, and which issued a report in May 1988 that outlined strategies for improving rates of minority matriculation, retention, and graduation. ACE and other *amici* also have gathered data for and submitted extensive comments to the U.S. Department of Education in connection with the Department's review of policies and practices concerning minority-targeted financial aid programs. ACE participated as an *amicus curiae* in both rounds of proceedings below.

The decision striking down the Benjamin Banneker Scholarship Program at the University of Maryland at College Park ("UMCP") is of great concern to *amici* because it is inconsistent with their policies and goals favoring increased participation of minority students in higher education. Moreover, the Court of Appeals decision conflicts with prior rulings of this Court and other federal authorities, and thus creates great uncertainty for *amici's*

---

for Advancement and Support of Education (represents approximately 2900 colleges and universities); Law School Admission Council (organization of 193 law schools in the United States and Canada; primary service is the Law School Admission Test); National Association for Equal Opportunity in Higher Education (association of 117 historically and predominately Black colleges); National Association of College and University Business Officers (represents over 2100 colleges and universities; promotes the sound management and financial administration of higher education institutions); National Association of Independent Colleges and Universities (represents over 840 private colleges and universities on public policy issues before the legislative, executive, and regulatory branches of the federal government); National Association of State Universities and Land-Grant Colleges (works to support the contributions that state and land-grant universities make through teaching, research, and public service/extension); National Association of Student Financial Aid Administrators (composed of more than 3000 postsecondary institutions as well as individuals and organizations concerned with student financial aid); and the National Association of Student Personnel Administrators (serves 5000 chief student affairs officers of higher education institutions).

member institutions. Finally, *amici* are concerned that by entering judgment for respondent without addressing petitioners' claim that the Banneker program is justified as a measure to secure student diversity, the Court of Appeals failed to credit sound legal precedent and established educational practice. *Amici* believe that sensitivity to these considerations is imperative, for the promotion of student diversity is a principled and educationally necessary objective that underlies minority-targeted aid programs operated by colleges and universities throughout the United States.

SUMMARY OF ARGUMENT

This case presents issues of exceptional importance regarding the efforts of American colleges and universities to redress the nation's legacy of discrimination and unequal participation in higher education, on account of race. The Court of Appeals decision striking down the Banneker Scholarships is flawed because of its narrow and inaccurate view of such minority scholarship programs. That view is inconsistent with the record as well as the experience of American colleges and universities, decisions of this Court, and longstanding federal government policies. Moreover, the Court of Appeals erred by summarily precluding the University of Maryland from defending the Banneker Scholarships based on their contribution to student diversity, a principled and educationally necessary goal well founded in this Court's decisions. Accordingly, the Petitions of William E. Kirwan, *et al.*, and Monica Greene, *et al.*, should be granted and the Court of Appeals decision should be reversed. Alternatively, the Court should grant a writ of *certiorari* to vacate the Court of Appeals Order, with instructions to remand this case to the district court for consideration of the diversity issue.

In ruling that the Banneker Scholarhips cannot withstand strict scrutiny, the Court of Appeals failed to consider evidence that minority-targeted financial aid pro-

grams, including UMCP's plan, are narrowly tailored remedies for lingering vestiges of past institutional discrimination. Proof in the record, recent empirical studies, and the experience of *amici* demonstrate that such programs are effective and often essential to enable colleges and universities to attract and retain minority students; are limited in scope and diffused in their impact on non-minority students, and thus are minimally intrusive means to increase minority participation in higher education; and are tailored to specific institutional circumstances that impede attraction and retention of minority students. The Banneker program thus is consistent with the Court's announced principles governing voluntary race-conscious public actions.

The Court of Appeals further misapplied the strict scrutiny standard by establishing novel and onerous requirements for colleges and universities. Its ruling would handcuff higher education institutions in their thoughtful and measured pursuit of the legitimate purposes served by minority scholarships. If allowed to stand, the ruling may deter UMCP and other colleges and universities from worthy and essential efforts to remedy past discrimination.

The Court of Appeals violated established legal principles by entering final judgment for respondent without examining the educational benefits of student diversity as an alternative basis for the Banneker Scholarships. The Court of Appeals rendered such a summary judgment *sub silentio*, declining to address UMCP's reliance on diversity or the arguments of *amici* on the diversity issue. Thus, neither lower court has expressly ruled on that issue. This clear error is another reason that the Court should grant *certiorari* and reverse the Court of Appeals ruling striking down the Banneker Scholarships. Alternatively, and in the event the Court elects not to reexamine the express rulings of the Court of Appeals, *amici* respectfully urge the Court to grant the writ for the limited purpose

of vacating the Court of Appeals judgment, with instructions to remand for district court consideration of the diversity issue.

ARGUMENT

I. THE COURT OF APPEALS DISREGARDED AMPLE EVIDENCE THAT MINORITY-TARGETED FINANCIAL AID PROGRAMS LIKE THE BANNEKER SCHOLARSHIPS ARE SMALL, UNIQUELY EFFECTIVE, AND TAILORED TO THE EDUCATIONAL NEEDS OF COLLEGES AND UNIVERSITIES THAT SPONSOR THEM, AND THUS ARE A MINIMALLY INTRUSIVE, VOLUNTARY MEANS TO LAWFUL ENDS.

Based on nationwide data, their members' experience, and record evidence regarding the Banneker Scholarships, *amici* believe that key features of "minority-targeted" [3] financial aid programs were wholly disregarded by the Court of Appeals in this case. Its ruling is consequently flawed and should be reversed.

An overwhelming consensus exists in the higher education community that minority-targeted aid programs such as the program at issue are effective, minimally intrusive means to assist higher education institutions to eradicate lingering effects of past discrimination and secure the educational benefits of racial and ethnic diversity. Moreover, most colleges and universities that employ minority scholarships consider them an essential component of their efforts to increase minority student participation in higher education. *Amici* respectfully urge the Court to take into account this national and historical perspective in deciding whether to examine the Court of

---

[3] *Amici* use the term "scholarship" herein as a synonym for "financial aid" and the term "minority-targeted" assistance to refer to financial aid for which membership in a particular historically underrepresented—*i.e.*, minority—group, or in one of several such groups, is a basis for eligibility.

Appeals' sweeping and in the view of *amici* misguided judgment that the Banneker Scholarships program is unlawful.

Recent empirical analyses of minority scholarship programs demonstrate clearly that such plans are widespread, effective, limited in size and scope, and highly varied in the criteria they apply and the specific goals they serve. Each of these factors weighs in favor of such programs, including the Banneker Scholarships, under applicable decisions of this Court.

The studies contain striking findings concerning the prevalence of minority-targeted financial aid programs. For instance, the United States Government Accounting Office found, based on a random-sample survey of 300 four-year undergraduate and graduate schools, that 64 percent of undergraduate schools and 72 percent of professional schools surveyed award at least some minority-targeted aid.[4] A report prepared by ACE in 1991 that summarized data from two other studies of minority-targeted aid programs related similar results: more than 80 percent of institutions surveyed (89 percent in one study, 83 percent in the other) have aid programs for which minority status was a criterion.[5]

---

[4] Human Resources Division, U.S. Government Accounting Office, *Higher Education, Information on Minority-Targeted Scholarships* (1994) (GAO/HEHS-94-77) ("GAO Study"), at 57 (Table III.2); *see also* Brief of *Amicus Curiae* American Council on Education in Support of Appellees (4th Cir. 1994) (Nos. 93-2527, 93-2585) ("Podberesky II ACE Am. Cur. Br."), Addendum ("Add."), at 1. The comparable figure for graduate schools is 32 percent. *Id.*

[5] Letter from Robert H. Atwell, President, American Council on Education, to The Honorable Lamar Alexander, U.S. Secretary of Education (May 2, 1991) (transmitting report entitled *Minority-Designated Scholarship Programs, A Compilation of Available Data on the Scope and Extent of Programs*) (summarizing data collected by the National Institute of Independent Colleges and Universities and the American Association of State Colleges and Universities) ("ACE Compilation"), at 7 (Table 1).

Higher education institutions have embraced targeted aid to minority students "as an essential strategy" to remedy past discrimination and attain the educational benefits of student diversity.[6] Pursuit of these goals is considered fundamental to providing a first-class program of higher education.[7] Higher education leaders' commitment to these goals is matched by their testimony to the importance and effectiveness of minority scholarship programs in achieving these objectives. In 1991, ACE reported that 63 percent of college administrators surveyed agreed that minority-targeted financial aid programs were "very important to [their] ability to attract and retain minority students."[8]

By contrast, prominent American educators have spoken out regarding the relative ineffectiveness of race-neutral financial aid strategies for increasing participation of minority students. As the former President of Princeton University and the current President of Harvard University have written, "the targeting of financial aid [to minority students] has obvious advantages: [g]reater visibility and clarity are achieved, a stronger 'signal' [of welcome] is sent, and available funds can be invested with

---

[6] *See Department of Education's Race-Specific Scholarship Policy: Hearings Before the Human Resources and Intergovernmental Relations Subcommittee of the Committee on Government Operations, House of Representatives*, 102d Cong., 1st Sess. 61 (1991) ("Hearings") (statement of Donald M. Stewart, President, The College Board).

[7] *See, e.g.*, App. 213a-216a (UMCP April 26, 1993 Decision and Report, discussion of Danforth, Hackney, and Shalala affidavits).

[8] ACE Compilation 1. *See* Hearings 39 (Statement of Richard Rosser, Ph.D., President, National Association of Independent Colleges and Universities) ("We had to have minority scholarships to get students to DePauw University. This is true, I would guess, of the majority of our private colleges and universities—which historically, of course, were essentially white institutions. We had to reach out and indicate to minorities that they really were wanted").

maximum likelihood that they will achieve their true purpose." [9]

The record evidence is strong that the Banneker program is effective and that UMCP needs minority-targeted aid in order to attract and retain high-achieving minority students. (App. 194a-210a). Among the significant benefits of the program in the view of *amici* is its contribution to redressing racial stereotypes regarding minority student achievement. For instance, Banneker scholars "have a higher concentration in . . . science and technical majors . . . traditionally . . . less accessible to African Americans." (App. 196a.)

Although widespread, minority scholarship plans are limited in size. For example, the GAO reported that such programs account for only five percent of individual financial aid awards, and four percent of financial aid funds at the undergraduate level.[10] At the graduate level, such programs account for approximately three percent of individual aid awards, and five percent of total aid dollars.[11] The percentage of students in the surveyed institutions who receive minority-targeted aid is still smaller—no more than one percent at the undergraduate and graduate levels, and no more than four

---

[9] Bowen, William G., and Rudenstine, Neil L., *Colleges Must Have the Flexibility to Designate Financial Aid for Members of Minority Groups*, The Chronicle of Higher Education, January 9, 1991, at B3.

[10] *See* GAO Study 58 (Table III.4); Podberesky II ACE Am. Cur. Br. Add. 2.

[11] *Id.* The proportion of minority-targeted aid is somewhat higher at professional (medical, law, and dental) schools surveyed by GAO (10 percent of all awards and 14 percent of all funds). *Id.* These results are consistent with the experience of such schools that it is extremely difficult to attract and retain minority students in significant numbers.

percent at the professional level.[12] Even the proportion of minority students receiving targeted aid is limited. Approximately seven percent of minority undergraduates, four percent of minority graduate students, and fifteen percent of minority students in professional school, receive such aid. *Id.*

The 1991 ACE study reached similar conclusions. Less than one percent of students in the surveyed institutions received minority-targeted aid. Between three and four percent of minority students received such aid. The programs represented no more than 2.5 percent of total aid funds at the institutions.[13]

It is thus clear that minority-targeted aid programs generally have no more than a *de minimus* impact on students otherwise qualified for financial aid who are ineligible for minority-targeted aid. These current practices of American colleges and universities pose no appreciable risk of harm to non-minority students' access to higher education.

The Banneker Scholarships, which account for only one percent of total available student aid at UMCP, are modest in scope and minimally intrusive. (App. 87a.)[14] Accordingly, *amici* agree with petitioners that respondent Podberesky failed to show that he suffered any significant injury as a result of the Banneker program.

A feature of minority-targeted aid programs is their great variety, based on distinctive institutional needs. Although most such programs are designed to reach students in racial or ethnic minority groups, the pre-

---

[12] *Id.* at 66 (Table III.10); Podberesky II ACE Am. Cur. Br. Add. 3.

[13] ACE Compilation 7 (Table 1).

[14] *Compare Flanagan v. President and Directors of Georgetown College*, 417 F. Supp. 377 (D.D.C. 1976) (allocation of 60 percent of institutional aid for minority or disadvantaged students in first year class violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d).

cise features and criteria of the programs vary greatly. For instance, the GAO identified, in its sample of colleges and universities, aid programs targeted to religion-, gender-, age-, national origin- and disability-based minority groups.[15] The GAO also discovered, upon in-depth examination of six institutions that offer minority-targeted aid, that the programs differed substantially based on such factors as the extent of the university's reputation as an inhospitable place for minority students to obtain an education, the extent of the institution's past success in recruiting and retaining minority students, the incidence of minority faculty on campus, the extent of the minority population in the state or region in which the institution is located, and additional factors affecting the success of recruitment and retention strategies other than minority-targeted aid.[16]

The data and views summarized above support petitioners' contentions that the challenged program is lawful under the Court's decisions governing voluntary race-conscious actions, including *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), as well as *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). That is, these facts strongly suggest that UMCP's program is not an arbitrary set-aside, that the Banneker Scholarships are minimally intrusive with respect to students ineligible for such aid, and that alternative programs are inadequate to attract and retain substantial numbers of high-achieving African-American students who will help UMCP to overcome its legacy of segregation.

The Court of Appeals evidently gave no meaningful consideration to these matters. This Court should grant

---

[15] GAO Study 60 (Table III.6).

[16] *Id.*, Appendix IV ("Case Studies of the Use of Minority-Targeted Scholarships at Six Schools").

the writ to ensure that an issue of great national importance, and vital to colleges and universities throughout the country, is decided in light of the record and the experience of the higher education community.

II. THE LEGAL STANDARDS EMBRACED BY THE COURT OF APPEALS WOULD RENDER IMPRACTICAL MANY GOOD FAITH EFFORTS, SUCH AS THE BANNEKER SCHOLARSHIPS, TO REMEDY VOLUNTARILY PAST DISCRIMINATION IN HIGHER EDUCATION.

Amici respectfully urge the Court to review the Court of Appeals decision because of the uncertainty, alarm, and confusion it has sown among colleges and universities regarding the legality of minority scholarship programs. The Court of Appeals, by deviating from precedent and applying harsh new constraints to the autonomy of higher education institutions, generated deep concern and confusion among the membership of *amici*, including institutions that already have minority-targeted financial aid programs and others that contemplate establishment of such programs.

Among the concerns expressed by *amici's* member institutions regarding the legal standards embraced by the Court of Appeals are the following. First, many higher education institutions are distressed because, as petitioners have articulated in their papers, the Court of Appeals analysis of the present effects of past discrimination found by the district court appears to conflict with this Court's rulings. These include decisions regarding the legal standards applicable to voluntary race-conscious actions by public bodies, *see Croson, supra; Wygant, supra*, and the Court's decisions regarding the obligations of public schools to eliminate vestiges of past discrimination.[17] Second, many colleges and uni-

---

[17] *See* Petition No. 94-1620, Section I; Petition No. 94-1621, Section I.

versities are confounded by the disparity between the Court of Appeals decision and the recent U.S. Department of Education Final Policy Guidance regarding minority-targeted financial aid programs, as well as the long-standing position of the federal government with respect to such programs. *See* Notice of Final Policy Guidance, 59 Fed. Reg. 8756 (February 23, 1994).[18]

The Court of Appeals decision establishes a test for "strict scrutiny" virtually impossible for many colleges and universities to satisfy. The Court of Appeals legal analysis would impose onerous and novel requirements on members of the *amici* that are committed to taking steps, within appropriate legal bounds, to increase minority students' participation in higher education. Thus, a consequence of allowing the Court of Appeals ruling to stand would be to discourage and in many respects to render infeasible good faith, voluntary steps by colleges and universities to remedy lingering effects of past discrimination on their campuses.[19]

The Court of Appeals failed to acknowledge UMCP's very extensive documentation and articulation of the dual

---

[18] *See* Petition No. 94-1620, Section II. Another source of concern regarding the conflict between the Court of Appeals decision and the Final Policy Guidance derives from the twists and turns of the federal government in reviewing its long-standing policy on minority-targeted financial aid. After several years of uncertainty during which it appeared that the government might alter its approval of narrowly tailored minority-targeted aid programs, the Final Policy Guidance purported to resolve the uncertainty by ratifying and elaborating federal policy. *See* H.R. Rep. No. 102-411, 102d Cong., 1st Sess. 7-8 (1991) (noting rulings by federal officials in the early 1980s approving minority-targeted aid programs).

[19] That result is particularly unfortunate where, as here, the institution is part of a formerly dual system of public higher education, and thus has an affirmative duty to combat vestiges of segregation. *See* Petition No. 94-1621, at 18-21; Petition No. 94-1620, at 15, 25-26.

rationale underlying the Banneker Scholarships. UMCP commissioned expert studies, obtained sworn testimony, and issued a 61-page Decision and Report concerning the questions the Court of Appeals posed in its January 1992 remand order: Do present effects of past segregation exist at UMCP justifying the Banneker program, and if so, what are those effects? The Court of Appeals decision conveys a skewed impression of the record in this respect. Rather than relate the facts concerning UMCP's Decision and Report that the district court addressed, the Court of Appeals merely noted that "[t]he district court allowed additional discovery to take place, after which cross-motions for summary judgment were filed." (App. 5a.) The implication, that UMCP's effort amounted to no more than routine discovery, fails to depict what happened. The district court more accurately described the record, noting the "strong" evidence produced by UMCP of present effects of past discrimination (App. 51a), as well as UMCP officials' "moral courage" in "engag[ing] in extended self-criticism." [20] *Amici* are concerned that if the University's very extensive evidence is adjudged so lacking in value, the law will be thought to impose an insuperable burden of proof. As a result, the law will give little incentive for other institutions—even those with pronounced lingering effects of past discrimination and small minority student populations—to acknowledge a need for narrowly tailored race-conscious remedial measures.

The Court of Appeals required UMCP to satisfy numerous other specific requirements supposedly linked to a fair inquiry into whether the Banneker program is nar-

---

[20] App. 51a n.47: "It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy. All other matters aside, UMCP administrators are to be commended for the moral courage that they have demonstrated in undertaking this self-examination with an admirable degree of candor."

rowly tailored. A few of these will demonstrate the onerous and novel quality of the Court's interpretation of the "strict scrutiny" test.

In treating the important topic of race-neutral alternatives, the Court of Appeals nowhere addressed one of petitioners' key claims in support of the Banneker program, that aid programs in which race is considered as one of many factors (or not at all), rather than as an eligibility criterion, are ineffective to increase minority recruitment and retention. (App. 26a-28a, 82a-84a.) The Court of Appeals merely stated, erroneously, that "the University has not made any attempt to show that it has tried, without success, any race-neutral solutions to the retention problem." (App. 27a.) The Court of Appeals also criticized UMCP for failing to try several supposed alternatives to financial aid, without identifying any record evidence that such measures are feasible or even race-neutral.[21] The approach of the Court of Appeals, to bypass extensive record evidence and propose alternative remedies that have no basis in evidence, was inconsistent with this Court's holding in *United States v. Paradise*, 480 U.S. 149, 171 (1987), that it is insufficient to posit race-neutral alternatives without establishing their efficacy relative to a challenged race-conscious program.

Petitioners identify other unwarranted aspects of the Court of Appeals decision. For example, petitioners note that the Court of Appeals erred in demanding that, to justify goals for ameliorating underrepresentation of minority students, UMCP would be required to "factor out . . . all nontrivial, non-race-based" explanations for dis-

---

[21] App. 26a (referring to additional "campus job opportunities" and "convenient, attractive, economically reasonable campus housing" for minority students). The exact nature of these supposed alternatives is quite vague. However, it appears, inexplicably, that the Court of Appeals faulted UMCP for not considering setting aside campus jobs or housing for minority students, while holding that UMCP may not allocate financial aid on that basis.

parities in minority and non-minority representation in the student body.[22] *Amici* agree with petitioners' analysis. Enforcement of such a requirement would tend to render minority scholarship programs impracticable. Most colleges and universities lack resources to conduct such elaborate analyses on a regular basis.[23]

The rigid approach the Court of Appeals employed in applying this Court's strict scrutiny requirement is inconsistent with the Court's admonition in *Bakke* that the Fourteenth Amendment must be enforced with due regard for "[t]he freedom of a university to make its own judgments as to education." 438 U.S. at 312. Unless the Court grants *certiorari* to correct this error, colleges and universities will be unsure whether they will next be subjected to similarly onerous requirements as a price for making modest and voluntary efforts to encourage minority presence on campus.

III. THE COURT OF APPEALS' IMPLICIT REJECTION OF DIVERSITY AS A LAWFUL RATIONALE FOR MINORITY-TARGETED FINANCIAL AID PROGRAMS WAS UNFOUNDED IN LAW OR FACT AND SHOULD BE VACATED.

ACE joined UMCP below in asserting that the Banneker Scholarships are justified as a narrowly tailored means to serve the lawful purpose of securing and main-

---

[22] *See* Petition No. 94-1620, at 21-23; Petition No. 94-1621, Section II.

[23] For related reasons having to do with the strongly-held view of colleges and universities that they should be entitled to conduct their own admissions processes—within appropriate legal limits, of course—*amici* also consider onerous the Court of Appeals' suggestion that the judiciary may hold the institutions to a formulaic determination of what their "effective minimum criteria" for admission are, notwithstanding the fact that institutional policy may establish a more flexible approach to admissions that will produce varied results from year to year. (App. 16a-18a.)

taining racial diversity within UMCP's student population. However, neither court in this case has to date squarely addressed the diversity issue. Notwithstanding that, and without explanation, the Court of Appeals implicitly rejected the diversity rationale in entering final judgment for respondent. The Court should grant *certiorari* to vacate that unfounded ruling, which concerns an issue of grave importance to many colleges and universities, including UMCP. If the Court sustains the ruling below that there are no lingering vestiges of past discrimination justifying the Banneker Scholarships, the Court should direct a remand to the district court for further proceedings on the diversity issue.

UMCP directly addressed the diversity issue on remand in the district court when UMCP relied on achieving student diversity as one of two grounds supporting its motion for summary judgment. (App. 157a, 213a-218a.) In its Decision and Report assessing whether there was a continuing basis for such a race-exclusive program, UMCP explained that its commitment to ethnic diversity is "integral" to its commitment to educational excellence. (App. 214a, 217a.) UMCP reasoned as the Court did in *Bakke* that "quality education takes place through wide exposure to the robust exchange of ideas," and that such interchange "is facilitated and enhanced when . . . students are brought together from various backgrounds and ethnic groups." (App. 214a-215a.)[24] The Banneker Program, UMCP concluded, was intended to address the "single greatest recruitment challenge" impeding attainment of student diversity. (App. 217a-218a.) Notwithstanding UMCP's articulation of its diversity rationale, the district court declined to address it.

As an *amicus curiae* opposing respondent's appeal of the 1993 district court ruling, ACE asked the Court of Appeals "to take into account the possibility that its analy-

---

[24] *See* 438 U.S. at 312-13.

sis of the Banneker Program" as a measure to remedy the present effects of past discrimination "may affect similar programs adopted to achieve campus diversity."[25] Like UMCP,[26] ACE sought to preserve the possibility of district court review of the diversity issue.[27] However, the Court of Appeals did not mention the diversity issue in entering judgment for respondent. (App. 30a.)

---

[25] Brief of *Amicus Curiae* American Council on Education in Support of Appellees (4th Cir. 1994) (Nos. 93-2527, 93-2585) ("Podberesky II ACE Am. Cur. Br.") 2 n.2.

[26] *See* Petition No. 94-1620, at 29 (noting UMCP's specific request that the Court of Appeals remand for consideration of diversity if it reversed the district court ruling).

[27] To that end, ACE presented to the Court of Appeals three major arguments in favor of the Banneker Program, under the diversity rationale, that ACE also had made as an *amicus curiae* in earlier proceedings in this case. *See, e.g.*, Brief of *Amicus Curiae* American Council on Education in Support of Appellees' Petition for Rehearing and Suggestion for Rehearing In Banc (4th Cir. 1992) (No. 91-2577). First, ACE argued that the record demonstrated that the Banneker Scholarships are operated in a manner consistent with the Court's rulings in *Bakke, Croson, Wygant,* and *Paradise, supra,* because they are narrowly tailored to serve the institution's interest in student diversity. In particular, ACE argued that the Banneker Scholarships are far more effective than programs that are race-neutral or that consider race or ethnicity as only one of many factors, and are distinctly different from the "set-aside" or race-based layoff plans condemned in *Croson, Wygant and Bakke,* because the Banneker Scholarships impose at most "relatively light" and broadly "diffused" adverse effects on ineligible non-minority students. *See* Podberesky II ACE Am. Cur. Br. 3-8; *Wygant*, 476 U.S. at 282. Second, ACE asserted that an evaluation of the Banneker program under the strict scrutiny standard should give due regard to the important First Amendment academic freedom considerations summarized by Justice Powell in *Bakke, see* 438 U.S. at 311-14; *see also Sweezy v. New Hampshire,* 354 U.S. 234 (1957); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), which are implicated by university policies related to promotion of student body diversity. *See* Podberesky II ACE Am. Cur. Br. 9-11. Third, ACE argued that a thorough strict scrutiny analysis of the Banneker Program could not ignore the recent regulatory

Amici concur with petitioners that the Court of Appeals' entry of a final judgment in favor of respondent implicitly rejected contentions that the Banneker Scholarships are constitutionally justified as a means to achieve the educational benefits of diversity.[28] *Amici* are concerned that this action may be improperly interpreted to condemn diversity as the basis for a minority-targeted scholarship plan. Accordingly, *amici* join the petitioners in urging the Court to grant *certiorari* to rectify this error.

Substantial harm would result to petitioners, *amici*, their members, and others if the Court of Appeals' implicit rejection of the diversity rationale is allowed to stand. Petitioners will have been denied a fair opportunity to have their diversity claim considered. Petitioners and all future students and other present and future members of the UMCP community will be denied the educational benefits of diversity that might have been nurtured by the Banneker Scholarships. Colleges and universities throughout the nation, and especially those in the Fourth Circuit, will be chilled in their good faith efforts to achieve student diversity through minority scholarships. These consequences would be particularly adverse in light of recent data that show limited progress, and in some respects declines, in minority participation in higher education.[29]

---

pronouncement on the subject by the U.S. Department of Education. *Id.* at 11-12 (discussing Final Policy Guidance).

[28] *See* Petition of William E. Kirwan, *et al.*, No. 94-1620, at 29; Petition of Monica Greene, *et al.*, No. 94-1621, at 30 n.29.

[29] *See, e.g.*, Carter, Deborah J., and Wilson, Reginald, *Minorities in Higher Education, 1994 Thirteenth Annual Status Report* 2 (American Council on Education 1995) ("African American high school graduates have experienced little improvement in college participation since 1990"); *id.* at 3, 10-12 (noting increase, from 1990 to 1993, in gap between college participation by African American and white high school graduates).

Amici urge the Court to grant the writ to preserve UMCP's right to establish that its reliance on the diversity rationale is valid. Reversal of the Court of Appeals decision would accomplish that result. Alternatively, the Court should vacate the Court of Appeals judgment at least to the extent that the judgment implicitly resolves the diversity issue. Further, the Court should direct the Court of Appeals to remand this matter to the district court for adjudication of the merits of the diversity rationale.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and either reverse the decision below, or vacate the decision below and remand for further proceedings that entail consideration of promoting student diversity as a basis for the minority-targeted financial aid program at issue.

Respectfully submitted,

Of Counsel:
SHELDON E. STEINBACH
General Counsel
American Council on Education
One Dupont Circle, Suite 800
Washington, D.C. 20036
(202) 939-9355

MARTIN MICHAELSON *
DANIEL B. KOHRMAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5748

* *Counsel of Record for Amici Curiae American Council on Education, et al.*

(6) (5)

Nos. 94-1620 and 94-1621

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. KIRWAN *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF INSTITUTIONS OF HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

(Institutions Listed on Inside Cover)

JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036-1872
(202) 828-2135
Counsel of Record for the Institutions of Higher Education as Amici Curiae

May 1, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10 pp

LIST OF INSTITUTIONS JOINING THIS BRIEF *

UNIVERSITY OF ARKANSAS
BAYLOR UNIVERSITY
GEORGETOWN UNIVERSITY
UNIVERSITY OF HAWAII
UNIVERSITY OF ILLINOIS
UNIVERSITY OF MICHIGAN
UNIVERSITY OF MISSOURI
UNIVERSITY OF MONTANA
UNIVERSITY OF NEW MEXICO
NORTHWESTERN UNIVERSITY
THE OHIO STATE UNIVERSITY
OREGON SYSTEM OF HIGHER EDUCATION
UNIVERSITY OF RHODE ISLAND
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY
UNIVERSITY OF TEXAS SYSTEM
TEXAS A&M UNIVERSITY SYSTEM
UNIVERSITY OF UTAH
VALPARAISO UNIVERSITY
WASHINGTON UNIVERSITY OF SAINT LOUIS
BOARD OF DIRECTORS, INDEPENDENT COLLEGES AND UNIVERSITIES OF TEXAS, INC.

UNIVERSITY OF ARIZONA COLLEGE OF LAW
NEW ENGLAND SCHOOL OF LAW
OHIO NORTHERN UNIVERSITY, CLAUDE W. PETTIT COLLEGE OF LAW
SOUTHWESTERN UNIVERSITY SCHOOL OF LAW
ST. MARY'S UNIVERSITY SCHOOL OF LAW
TEXAS TECH SCHOOL OF LAW
THURGOOD MARSHALL SCHOOL OF LAW AT TEXAS SOUTHERN UNIVERSITY
TOURO COLLEGE, JACOB D. FUCHSBERG LAW CENTER

---

* There are no parent or subsidiary companies within the meaning of Rule 29.1.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS ARE WIDESPREAD AT INSTITUTIONS OF HIGHER EDUCATION AND SERVE IMPORTANT INSTITUTIONAL GOALS WITHOUT UNDULY BURDENING OR DIMINISHING THE OPPORTUNITIES OF INELIGIBLE STUDENTS 4

II. UNDER THE FOURTH CIRCUIT'S APPROACH TO RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS, FEW WOULD SURVIVE 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES: Page

Brown v. *Board of Education*, 347 U.S. 483 (1954) 2

Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990) 5

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) 5, 11

United States v. *Fordice*, 112 S. Ct. 2727 (1992) 5

Wygant v. *Jackson Board of Education*, 476 U.S. 267 (1986) 10, 11

STATUTES:

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988) 2, 5

Montana Code Ann. § 20-25-421(4)(a) (1993) 7

OTHER AUTHORITIES:

Montana Board of Regents Policy 940.13.d (1994) .. 7

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Proposed Policy Guidance (Dep't of Ed.), 56 Fed. Reg. 64548 (Dec. 10, 1991) 4

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Notice of final policy guidance (Dep't of Ed.), 59 Fed. Reg. 8756 (Feb. 23, 1994) 4, 5, 6

United States General Accounting Office, "Higher Education: Information on Minority-Targeted Scholarships" (January 1994) (GAO/HEHS-94-77) 4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1620

WILLIAM E. KIRWAN *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

No. 94-1621

MONICA GREENE *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF INSTITUTIONS OF HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

This brief is submitted on behalf of twenty-seven institutions of higher education—listed on the inside cover of this brief—that wish to support the granting of writs of certiorari so that the decision of the Fourth Circuit in

---

[1] The parties' written consents to the filing of this brief are being filed today with the Clerk of the Court.

this case may be reviewed by this Court.[2] Many of the institutions joining this brief have race-specific or minority-specific scholarship programs of their own. While these programs take many different forms and have been adopted by institutions with different circumstances and histories, they share a common characteristic: they have proven to be effective tools in attracting and retaining minority students.

Like the University of Maryland at College Park ("UMCP"), some of these institutions had a history of legal segregation before *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and have been subject to proceedings and negotiations with the Office of Civil Rights of the Department of Education (and its predecessor) for many years after the passage of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, aimed at ensuring that the previously segregated system has been disestablished and the effects of prior discrimination eliminated. Some of these institutions—like UMCP—partly justify their race-specific scholarship programs as efforts to remedy past discrimination in response to enforcement proceedings instituted by the Office of Civil Rights in the past. The rejection by the Fourth Circuit of the "remediation justification" put forward by UMCP —in spite of the extensive evidence that the University assembled in support of its program—may jeopardize such programs at institutions that have been targeted by the Federal Government for enforcement proceedings under Title VI in the past.

Other institutions joining this brief do not have histories of segregation or believe that they have already

---

[2] The decisions in the lower courts appear at 764 F. Supp. 364 (D. Md. 1991) (App. 109a) (granting defendants' motions for summary judgment), 956 F.2d 52 (4th Cir. 1992) (App. 96a) (reversing and remanding), 838 F. Supp. 1075 (D. Md. 1993) (App. 34a) (granting defendants' motions for summary judgment), and 88 F.3d 147 (4th Cir. 1994) (App. 1a) (vacating and remanding with directions to grant plaintiff's motion for summary judgment).

remedied past discrimination. They justify their race-specific or minority-specific programs solely or principally as legitimate efforts to promote or achieve a diverse student body, or expect in the future to justify their programs on these grounds. Those institutions fear that the Fourth Circuit's ruling, including its cursory treatment of UMCP's contention that its scholarship program was justified in part on diversity grounds, also places in legal jeopardy their own scholarship programs.

Finally, other institutions do not have race-specific or minority-specific scholarship programs at the present time, but support the institutional and societal objectives served by such programs and wish to be free to adopt such programs in the future.

All of the institutions joining this brief are troubled by the implications and effects of the Fourth Circuit's decision and urge its consideration by this Court. Race-specific scholarships have been an essential weapon in the arsenal of techniques used by colleges and universities to attract minority students and to retain them once they are admitted. Today, when the number of qualified minority students enrolled at many institutions of higher education is declining, the need for carefully targeted minority financial aid remains as high as ever. The Fourth Circuit's decision fails to provide useful guidance for race-specific scholarship programs but instead virtually slams the door on such programs, sending an unmistakable warning both to the administrators of such programs and to students of all races. The effects of the decision could be devastating to the effort—barely more than a generation old—to increase the participation of minority students at American colleges and universities.

The petitioners have already briefed the facts of this case in detail and demonstrated the ways in which the Fourth Circuit's decision diverged from well-established law in this area. In addition, the petitions and the briefs of other *amici* demonstrate well the national importance

of this case. The institutions joining this brief support the petitions. In what follows, we highlight the importance of the case to institutions of higher education and some of the difficulties posed by the Fourth Circuit's decision.

ARGUMENT

I. RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS ARE WIDESPREAD AT INSTITUTIONS OF HIGHER EDUCATION AND SERVE IMPORTANT INSTITUTIONAL GOALS WITHOUT UNDULY BURDENING OR DIMINISHING THE OPPORTUNITIES OF INELIGIBLE STUDENTS.

In 1991, in soliciting comments on proposed policy guidance on nondiscrimination in student financial aid, the Department of Education took note of evidence from the American Council on Education ("ACE") showing that "approximately 3.5 percent—about 45,000—of all minority students at four-year colleges receive 'race-exclusive scholarships', that is, scholarships for which students of only a designated race or national origin may compete." According to the ACE, "colleges most often offer race-exclusive scholarships in order to increase the diversity of their student populations." 56 Fed. Reg. 64548 (Dec. 10, 1991).

By the time the Department issued its final policy guidance in 1994, 59 Fed. Reg. 8756 (Feb. 23, 1994), the General Accounting Office had studied the matter and reported that 64 percent of all undergraduate schools, 32 percent of graduate schools, and 72 percent of all professional schools had one or more minority-targeted scholarships.[3]

---

[3] United States General Accounting Office, "Higher Education: Information on Minority-Targeted Scholarships" (January 1994) (GAO/HEHS-94-77) at 59, Table III.2. The Report (at 1) defines "minority-targeted scholarships" as "scholarships for which some form of minority status is an eligibility requirement."

It is obvious from these figures that many institutions of higher education have found minority-specific scholarship programs necessary and appropriate to serve important educational and institutional values. For institutions that, like UMCP, have an acknowledged history of segregation, eliminating current effects of past discrimination is of course an appropriate goal—indeed one required by law. In determining whether states have discharged that obligation, this Court has consistently asked "whether existing racial identifiability is attributable to the State and examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system." *United States* v. *Fordice*, 112 S. Ct. 2727, 2735 (1992). Many institutions, like UMCP, have decided that a limited number of race-specific scholarships appropriately advance that important goal without running afoul of the Fourteenth Amendment or Title VI. The Department of Education expressly recognizes the appropriateness of race-specific scholarships in achieving this goal, so long as there is a "strong basis in evidence" for concluding that the college's action is "necessary to remedy the effects of its past discrimination." 59 Fed. Reg. at 8757.

In addition, for institutions of higher education that have adopted race-specific or minority-specific programs —both those that have a history of past discrimination and those that do not—those programs serve the important goal of furthering the "attainment of a diverse student body," the goal identified in *Bakke* as "a constitutionally permissible goal for an institution of higher education." *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 311-12 (1978) (Powell, J.). See also *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 568 (1990) ("a 'diverse student body' contributing to a '"robust exchange of ideas"' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated * * *").

Attainment of a diverse student body at a university serves important educational goals. As the Department of Education observed, many colleges "seek to create on campus an intellectual environment that reflects" the nation's own diversity, as "America * * * has forged one Nation from many people of a remarkable number of different backgrounds." 59 Fed. Reg. at 8757. Such a diverse intellectual environment benefits students of *all* races and backgrounds. The UMCP Decision and Report Regarding the Benjamin Banneker Scholarship Program (hereinafter the "Report"), reproduced in the Appendix to the petitions at pp. 139a-220a, not only states UMCP's commitment to a diverse student body to further its educational goals, but demonstrates that other institutions share that commitment, quoting affidavits in the record from Donna E. Shalala, then Chancellor of the University of Wisconsin-Madison and now Secretary of the Department of Health and Human Services (App. 213a-214a), William H. Danforth, Chancellor of Washington University (App. 215a-216a), and Sheldon Hackney, then President of the University of Pennsylvania and now Chair of the National Endowment for the Humanities (App. 215a, n.126). Ms. Shalala stated that her own university "cannot provide a quality education—that is, an education which will prepare students to live, work and provide leadership in the United States—without the active participation of and exposure to a diverse student body." App. 214a. Dr. Danforth said:

> "While *de jure* segregation is a thing of the past (albeit the recent past), the attitudes and stereotypes that accompanied legal segregation have not disappeared. Changes in beliefs and attitudes require time and education. We think it important that American institutions, in partnership with government, take active steps to make these institutions places where African Americans feel welcome and to continue the work of dismantling old ideologies and prejudices." App. 215a.

Such quotations could be multiplied endlessly, but we believe that the importance that institutions have long placed on a diverse student body is not a matter of serious dispute.

To attain desirable student diversity, many institutions —like UMCP—have decided that one appropriate tool is the race-specific or minority-specific scholarship. Dr. Danforth, in the affidavit just quoted, reported that the number of African Americans who applied to Washington University tripled after a scholarship program targeted at African Americans, and awarded to up to ten freshmen each year, was instituted in 1987.[4] UMCP adopted another form of such a program. Its Banneker Scholarship Program awards twenty to thirty full scholarships per year to high-achieving black students already selected for admission and encompasses about one percent of financial aid moneys available to UMCP students. Other institutions may target different groups—Asian Americans, Hispanics, Native Americans,[5] or other race or minority groups—and may have programs that are considerably more limited in number, covering only one or two students. Isolated instances of race-specific or minority-specific scholarships may arise at a university because committed graduates or other philanthropists may have contributed money in honor of a prominent graduate. Moreover, while UMCP decided to award its Banneker

---

[4] Affidavit of William H. Danforth, UMCP Decision and Report Exhibit 68, ¶¶ 8-12.

[5] For example, the State of Montana specifically authorizes the University of Montana system to waive tuition and fees for persons of one-fourth Indian blood in residency in the State. Montana Code Ann. § 20-25-421(4)(a) (1993). Pursuant to that authority, the Montana Board of Regents has required all public university campuses to give tuition and fee waivers to such persons when they meet financial need prerequisites. Montana Bd. of Regents Policy 940.13.d (1994). The University's main campus in Missoula has granted an average of 173 waivers annually over the past few years pursuant to this policy.

Scholarships regardless of need, other institutions continue to require a showing of need, even where particular scholarships are limited to members of particular groups.

With all the variations in the form of race-specific or minority-specific scholarships, and with all the variations in the histories and philosophies of the institutions that have adopted them, such programs typically provide a small percentage of the total scholarship money available to students and award money to a small percentage of the minority students at the institution.[6] These scholarships ordinarily and demonstrably supplement existing scholarship programs, rather than taking money away from existing programs. The money for the scholarships often has been donated for the specific purpose advanced by the particular scholarship, so that there is no good reason to believe that the money would nevertheless have been available had the institution refused to accept it as funding for a race-specific or minorty-specific scholarship. Thus, not only do these scholarships serve important institutional goals at the institutions that have adopted them, but they do so in a limited way that imposes little or no direct "burden" on ineligible students.

II. UNDER THE FOURTH CIRCUIT'S APPROACH TO RACE-SPECIFIC OR MINORITY-SPECIFIC SCHOLARSHIPS, FEW WOULD SURVIVE.

Faced with a lawsuit challenging its race-specific scholarship program, UMCP undertook a careful review of the program and issued a 71-page Decision and Report with 69 exhibits. App. 139a-220a. That Decision and Report summarized the University's history of discrimination against African Americans; examined the available evidence that significant present effects of past discrimination continued to exist at the University, concluding that such effects do exist; pointed out the minimal effect of

---

[6] See GAO Report, *supra*, at 4-5 & 60, Table III.4.

the program on ineligible students; demonstrated that other programs to recruit and retain minority students have not been as successful as hoped, while the Banneker program has proved effective; and committed itself to review the need for the program every three years (see App. 212a). While that Decision and Report convinced the district court that UMCP's program was justified under this Court's decisions, the Fourth Circuit ruled the program unlawfully discriminatory in an opinion that gives little or no credit to the University's effort, rejects some justifications as a matter of law, and finds the Banneker Program "not narrowly tailored" to remedy past discrimination.

It is hard for the institutions of higher education that have a direct interest in these issues to read the Fourth Circuit's decision as signalling anything other than extreme judicial hostility to *any* race-specific or minority-specific scholarship program an institution might offer—no matter what justification and evidence the institution assembles in its defense and no matter how limited the program in relation to other financial aid offered by or through the institution. No institution of higher education that justifies its own race-specific or minority-specific scholarship program as a reasonable means to achieve diversity can rest easy if the Fourth Circuit's decision goes unreviewed and is taken as a guide by other Circuits. Several examples make the point.

First, the University's Decision and Report contained direct evidence of a causal connection between the vestigial effects of *de jure* segregation, the contemporary attitudes of African Americans towards UMCP, and the present effects of those attitudes on their willingness to attend UMCP. The district court found the evidence "overwhelming" that UMCP continues to have a poor reputation among African Americans, attributable to its past discrimination, and that this poor reputation affects recruitment of African-American students. 838 F. Supp.

at 1084-87 (App. 54a-62a). The Fourth Circuit, however, trivialized this record evidence with the remark that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy." 38 F.3d at 154 (App. 10a). One can only wonder at this casual conflation of "mere knowledge of historical fact" with the specific cause-and-effect relationship that the University was offering evidence to establish and that the district court found to be established. This casual rejection of record evidence sends a dismaying signal to other institutions.

Second, the district court found that, by attracting "high-achieving black students" to the University, the Banneker Program "serves to enhance UMCP's reputation in the African-American community, increase the number of the African-American students who might apply to the University, improve the retention rate of those African-American students who are admitted and help ease racial tensions that exist on the campus." 838 F. Supp. at 1095 (App. 83a). In rejecting this justification, the Fourth Circuit found it relevant to say: "High achievers, whether African-American or not, are not the group against which the University discriminated in the past." 38 F.3d at 158 (App. 20a). Again, one can only wonder at this statement when the record is undisputed that the University had previously excluded *all* African Americans, regardless of the level of their achievement.

Third, while UMCP had justified its program in part on the ground that Banneker Scholars would serve as mentors and role models for other African-American students, thereby attracting more African-American students —a justification the district court again found persuasive—the Fourth Circuit dismissed the contention on the ground that "[t]he Supreme Court has expressly rejected the role-model theory as a basis for implementing a race-conscious remedy, as do we," citing *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 276 (1986) (plural-

ity opinion). 38 F.3d at 159 (App. 22a). *Wygant*, however, merely found that the school board's interest in providing minority role models for its minority students was insufficient to justify a lay-off program for teachers under which the percentage of minority teachers to be retained was tied to the percentage of minority students. That case cannot fairly be read as requiring the rejection of UMCP's role-model justification of the considerably narrower Banneker program—which grants financial aid to African Americans in numbers far below their representation at the University and which is merely one small part of the University's overall financial aid program.

Finally, having decided that the University's motion for summary judgment could not be granted because, in the Court's view, the program was not "narrowly tailored to remedy past discrimination," the Court failed to address UMCP's separate justification that the program was necessary to achieve the University's goal of a diverse student body and proceeded—on grounds that are difficult to decipher—to direct the district court to grant the plaintiff's motion for summary judgment. 38 F.3d at 161-62 (App. 28a-29a). Moreover, when the Fourth Circuit had discussed the diversity justification in its first decision in 1992, it had appeared to read *Bakke* as preventing a university from ever justifying a scholarship program limited to black students on the ground of achieving "genuine diversity." 956 F.2d at 56 n.4 (App. 103a n.4).

All agree that decisions of institutions of higher education to adopt race-specific or minority-specific scholarship programs are not immune from judicial review. Applicable precedent of this Court provides that there is a constitutional or statutory standard to be met. But the Fourth Circuit's decision goes far beyond that precedent in applying what it sees as the appropriate standard in such a way as to condemn almost any university's attempt to justify race-specific and minority-specific scholarship programs.

This Court should grant review of this case to ensure that the Fourth Circuit and other circuits do not, by the device of applying standards that cannot realistically be met, effectively outlaw race-specific and minority-specific scholarship programs.

CONCLUSION

For all of these reasons, as well as the reasons set forth in the petitions, this Court should grant the petitions for writ of certiorari.

Respectfully submitted,

JOHN TOWNSEND RICH
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036-1872
(202) 828-2135
Counsel of Record for the Institutions of Higher Education as Amici Curiae

May 1, 1995

Nos. 94-1620 and 94-1621

Supreme Court, U.S.
FILED
MAY 1 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. KIRWAN, *et al.*,
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,
v.
DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MARYLAND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND AND THE UNITED NEGRO COLLEGE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
PACE J. MCCONKIE
1450 G Street, NW, Suite 400
Washington, DC 20005
(202) 662-8600

GEORGE W. JONES, JR.*
MARK E. HADDAD
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, DC 20006
(202) 736-8000

* Counsel of Record

Attorneys for Amicus Curiae
The Lawyers' Committee For Civil Rights Under Law

(Additional Counsel Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

LOUIS M. BOGRAD
122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681
Attorney for Amicus Curiae American Civil Liberties Union Foundation

SANDRA DEL VALLE
99 Hudson Street
New York, NY 10013
(212) 219-3360
Attorney for Amicus Curiae Puerto Rican Legal Defense & Education Fund, Inc.

DENNIS COURTLAND HAYES
General Counsel
WILLIE ABRAMS
Asst. General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 486-9191
Attorneys for Amicus Curiae National Association for the Advancement of Colored People

SUSAN GOERING
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555
Attorney for Amicus Curiae American Civil Liberties Union Foundation of Maryland

FERNANDO OLGUIN
ANTONIA HERNANDEZ
634 S. Spring St., 11th Fl.
Los Angeles, CA 90014
(213) 629-2512
Attorneys for Amicus Curiae Mexican American Legal Defense and Educational Fund, Inc.

FARNEFE N. HAYNES
General Counsel
WILLIAM A. BLAKEY
Washington Counsel
8260 Willow Oaks Corporate Drive
Fairfax, VA 22031
(703) 205-3544
Attorneys for Amicus Curiae The United Negro College Fund

May 1, 1995

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
INTRODUCTION	4
REASONS FOR GRANTING THE PETITIONS	7
I. THE FOURTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD	7
II. THE PANEL'S APPLICATION OF THE WRONG LEGAL STANDARD, AND ITS FAILURE TO CONSIDER THE HISTORICAL CONTEXT WHEN EVALUATING THE FACTS, CAUSED ITS ANALYSIS TO BE WHOLLY INCONSISTENT WITH THIS COURT'S SCHOOL DESEGREGATION CASES	12
A. The Panel's Application Of The "Compelling Interest" Analysis Was Erroneous	12
B. The Panel's Application Of The "Narrow Tailoring" Analysis Also Was Erroneous	16
1. High-achieving African-American Students	17
2. Including Non-Residents Of Maryland	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Bazemore v. *Friday*, 478 U.S. 385 (1986) 16
Board of Educ. v. *Dowell*, 498 U.S. 237 (1991) 2
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 2, 4, 5, 8
Columbus Bd. of Educ. v. *Penick*, 443 U.S. 449 (1979) 10
Dayton Bd. of Educ. v. *Brinkman*, 443 U.S. 526 (1979) 7, 9, 10
Evans v. *Buchanan*, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980) 15
Freeman v. *Pitts*, 112 S. Ct. 1430 (1992) 2, 7, 9, 10, 14
Green v. *County Sch. Bd.*, 391 U.S. 430 (1968) 7, 9
Keyes v. *School Dist. No. 1*, 413 U.S. 189 (1973) 10, 14
Knight v. *Alabama*, 14 F.3d 1534 (11th Cir. 1994) 15
McLaurin v. *Oklahoma State Regents*, 339 U.S. 637 (1950) 15
Missouri v. *Jenkins*, 495 U.S. 33 (1990) 2
Morrow v. *Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974) 14
North Carolina State Bd. of Educ. v. *Swann*, 402 U.S. 43 (1971) 10
Podberesky v. *Kirwan*, 38 F.3d 147 (4th Cir. 1994) ..... *passim*
Podberesky v. *Kirwan*, 838 F. Supp. 1075 (D. Md. 1993) 17, 18
Swann v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) 10, 11
Sweatt v. *Painter*, 339 U.S. 629 (1950) 15
United States v. *Board of Sch. Comm'rs*, 506 F. Supp. 657 (S.D. Ind. 1979), *vacated in part on other grounds*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) 14
United States v. *Fordice*, 112 S. Ct. 2727 (1992) ..... *passim*
United States v. *Paradise*, 480 U.S. 149 (1987) 12
Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) 4, 5, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-1620 and 94-1621

WILLIAM E. KIRWAN, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

MONICA GREENE, *et al.*,
Petitioners,

v.

DANIEL J. PODBERESKY,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MARYLAND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND AND THE UNITED NEGRO COLLEGE FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit organization established in 1963 at the request of the President of the

United States to involve leading members of the bar throughout the country in a national effort to insure civil rights to all Americans. The Lawyers' Committee has a long history of participation in school desegregation cases, see, *e.g.*, *Missouri* v. *Jenkins*, No. 93-1823; *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992); *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991); *Missouri* v. *Jenkins*, 495 U.S. 33 (1990), and in cases addressing the principles of affirmative action, including *Adarand Constructors, Inc.* v. *Peña*, No. 93-1841; *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 467 (1989), and is concerned with the development of sound precedent regarding the means of eliminating the effects of discrimination.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Maryland is its statewide affiliate. The ACLU has been deeply involved in the effort to desegregate America's schools and to remove the vestiges of prior *de jure* segregation. As part of that ongoing effort, the ACLU served as counsel in *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992). The ACLU has also participated in most of this Court's cases concerning discrimination.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest and largest civil rights organization with more than 500,000 members. Equal educational opportunity for minority group citizens, particularly African-American youth, has been one of the fundamental goals of the NAACP since its founding. As epitomized by its role in the landmark *Brown* decision, the NAACP historically has been a leader in litigating school desegregation cases at the elementary, secondary and college level, and related constitutional and civil rights issues in public education. Currently, the NAACP is a party in

numerous cases across the country which address issues of equality of opportunity and quality education in public school systems.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national nonprofit civil rights organization dedicated to promoting the rights of Hispanics in the United States in the areas of education, employment, immigration and political access. One of MALDEF's Education Program goals is to dismantle—through litigation and public policy advocacy—institutional discrimination that impedes Hispanic students' attainment of post-secondary educational degrees. MALDEF is particularly concerned about any cutback in or decreased commitment to affirmative action programs aimed at increasing the number of Hispanic students admitted to, retained in and graduated from post-secondary educational institutions. MALDEF has represented Hispanic students, immigrant students, and their parents in desegregation cases.

The Puerto Rican Legal Defense & Education Fund, Inc. ("PRLDEF") is a national civil rights organization dedicated to protecting and furthering the rights of Puerto Ricans and other Latinos. PRLDEF has been involved in many education cases involving the rights of Latinos to bilingual education, desegregated education and quality education. PRLDEF is concerned with recent efforts to reduce affirmative action in higher education. Currently, Latinos are 12% of the 18- to 24-year olds but less than 4% of the students attending four-year colleges. PRLDEF is interested in this case because it concerns the use of affirmative action in scholarships for minorities. It believes there should be more effort to provide these benefits to Latinos. However, it does not believe that the Banneker Program's targeting of African-Americans violates the rights of Latinos or others.

The United Negro College Fund ("UNCF") represents forty-one private, historically black colleges and univer-

sities located in Ohio and throughout the south and southwestern United States. UNCF institutions enroll fifty-five thousand predominantly African-American students, as well as international students and many white Americans. UNCF member institutions have always been, and continue to be, advocates for and practitioners of equal opportunity in higher education—employing faculty, staff and administrators from all racial, religious and ethnic backgrounds. While serving a primarily African-American student constituency, UNCF embraces and advocates on behalf of the interest of all minority students in higher education. Like historically black colleges and universities, minority and race-specific scholarships remain an essential tool for educating and training minority students for employment and productive citizenship in the twenty-first century.

INTRODUCTION

This case is of extraordinary national importance because it involves two fundamental civil rights issues that the Court has confronted in recent years: 1) the obligation of States with formerly segregated higher education systems to dismantle those systems; and 2) the circumstances in which States can implement affirmative action programs. The court below was asked to assess the propriety of a race-based scholarship program adopted by a State university as one element of a plan to dismantle a *de jure* segregated higher education system in response to uncontested findings of the United States Department of Education and the State of a continuing constitutional violation. The essential question presented in this case is whether the panel erred in applying the standard for reviewing voluntary, race-conscious affirmative action programs undertaken in the absence of a history of *de jure* segregation, set forth in *City of Richmond* v. *J. A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), rather than the standards establishing the constitutional obligation effectively

to eliminate all vestiges of dual educational systems set forth in *United States* v. *Fordice*, 112 S. Ct. 2727 (1992), and this Court's school desegregation precedent.

The Fourth Circuit's decision conflicts with and ignores the legal standard applicable to a state university that adopts a race-based remedy to fulfill its constitutional duty to eliminate the vestiges of a prior *de jure* segregated system. In evaluating the Banneker scholarship program adopted by the University of Maryland at College Park ("the University" or "UMCP"), the panel erroneously relied upon this Court's decisions concerning the adoption of purely voluntary race-based policies in cases which did not involve any proven violations of law or any established history of official segregation and discrimination—*Croson*, 488 U.S. 469, and *Wygant*, 476 U.S. 267—and ignored this Court's decisions confirming that States have an affirmative obligation to remove all vestiges of *de jure* segregated school systems. Thus, the law of the Fourth Circuit is that *Croson* and *Wygant* have supplanted the large body of school desegregation jurisprudence from *Brown* to *Fordice*.

The question whether the Fourth Circuit correctly construed the Court's decisions is one of fundamental importance because the panel's holding directly will affect the rights of students, faculty and the public to have higher education systems dismantle dual systems and eliminate the effects of discrimination. Former *de jure* segregated systems have necessarily employed race-conscious remedies to dismantle dual systems of education. Likewise, voluntary action by school authorities is not only required, but is encouraged to avoid unnecessary judicial administration of educational systems. The decision below threatens the availability of relief necessary to dismantle dual systems and affirmatively discourages voluntary remedial action by school authorities to fulfill their obligation to dismantle *de jure* segregated systems. As a result, States in the Fourth Circuit will be reluctant to

take initiatives to eradicate the lingering effects of unlawful public education systems and students may be forced to seek relief in the federal courts. To avoid such a result, this Court should grant the petitions and provide the States and the lower courts with urgently needed guidance on the proper legal standard under which state remedial programs are to be reviewed by the courts.

To assist the Court in evaluating the parties' petitions, this brief will focus on two points. In Section I, the brief explains that the panel used the wrong legal standard in evaluating UMCP's Banneker scholarship program. Specifically, the panel erred in using the standard adopted in *Croson* and *Wygant* for purely voluntary affirmative action programs undertaken in the absence of any established record of *de jure* segregation, and failed to apply the long-standing standards imposed on prior *de jure* school systems that have not attained unitary status, namely that the school system is constitutionally compelled to take remedial action. A proper analysis would adhere to the standards and principles established by this Court's school desegregation cases.

In Section II, the brief discusses how the panel's application of the wrong legal standard, and its failure to consider the historical context, caused it to reach conclusions that are wholly at odds with the uncontested facts regarding Maryland's dual higher education system and irreconcilable with the holdings of the Court's key desegregation decisions. First, the panel's conclusion that the State did not have a "compelling interest" in taking remedial action conflicts with the acknowledged dual system and the undisputed findings of the State and the district court that the system has not been fully dismantled, and that the effects of the dual system persist. The panel simply ignored both fact and law in concluding that two of the State's proffered justifications for the remedial scholarship program—poor reputation and hostile campus climate for African-Americans—are irrelevant as a matter

of law. These effects consistently have been recognized in this Court's desegregation cases as vestiges of segregated systems that must affirmatively be remedied. Second, the panel's analysis under the "narrow tailoring" standard was equally erroneous. The appropriate standard must take into account the State's obligation to implement an effective remedial program that dismantles the dual system and eliminates the vestiges of discrimination. *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 (1992); *Fordice*, 112 S. Ct. at 2735; *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 538 (1979) ("*Dayton II*"); *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437 (1968).[1]

REASONS FOR GRANTING THE PETITIONS

I. THE FOURTH CIRCUIT APPLIED THE WRONG LEGAL STANDARD.

One of the most striking things about the Fourth Circuit's opinion is that it makes virtually no reference to any of this Court's decisions establishing and confirming the States' long-standing obligation to take all action necessary to eliminate segregation and discrimination in public education. The Fourth Circuit reasoned that the fact that the defendant was a public university that had engaged for more than a century in notorious and egregious acts of discrimination was not relevant. From the panel's opinion, one would never know of the existence of the obligations imposed by *Brown* v. *Board of Education* and reaffirmed many times thereafter, most recently in *Fordice*, much less Maryland's shameful history of *de jure* segregation in all levels of education.

---

[1] *Amici* note that the second Question Presented in the separate Petition of William E. Kirwan, *et al.*—whether a State's interest in promoting diversity can be a constitutionally sufficient justification for remedial action—though raised, was not addressed by either court below. Therefore, to the extent that this Court does not reverse on the basis of the remedial justification, the appropriate disposition of this case is to vacate and remand for consideration of the State's alternate diversity rationale.

This fundamental shortcoming is traceable to the panel's erroneous conclusion that this Court's decisions in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), provide the correct legal standard for resolution of this case. *Croson* and *Wygant* both involved public entities that adopted affirmative action policies in areas where there was no established record or history of prior discrimination. In neither case were there any findings, either judicial or administrative, that the existing racial disparities in particular areas were traceable to past acts of discrimination by the public entities, let alone a prior system of state imposed *de jure* segregation. *Wygant*, 476 U.S. at 278 ("no such determination [of prior discrimination in hiring by school board] ever has been made"); *Croson*, 488 U.S. at 500 ("There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry") (citations omitted). Using as its starting point precedent relevant to these different factual contexts, the Court concluded that the voluntary affirmative action programs could not withstand strict scrutiny because the public entities had neither demonstrated a compelling interest in implementing race-conscious remedial actions nor adopted remedies that were narrowly tailored to address prior discrimination.

Because *Croson* and *Wygant* presuppose no record of past *de jure* discrimination and no constitutional duty to dismantle an unlawful system, the panel erred in mechanically applying those decisions to a case where the state actor has a long history of discrimination and there are undisputed findings that the violation has not been cured. The panel failed to apply the long-standing and unequivocal obligations imposed on *de jure* public education systems by *Brown* and its progeny. That is, the panel ignored the existence of the historical system of segregated education and the State's affirmative duty to rem-

edy the constitutional violation, and instead analyzed the Banneker scholarships as a wholly voluntary program isolated from any past discrimination, like the programs in *Croson* and *Wygant*.

The panel's analysis is deficient and will lead to confusion because it displaces the standards and principles established by this Court's school desegregation decisions. These principles and standards control the legal analysis of race-conscious remedial programs undertaken by prior *de jure* school systems. First and foremost, the legal analysis must recognize that States that maintained *de jure* school segregation are under a continuing, affirmative duty to eradicate the *de jure* system and its lingering effects. "The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present." *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 (1992); see also *Green* v. *County Sch. Bd.*, 391 U.S. 430, 437-38 (1968) (school district has an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch"); *Dayton II*, 443 U.S. 526, 538 (1979). This obligation applies to higher education systems as well as to primary and secondary systems. *Fordice*, 112 S. Ct. at 2735 (1992) ("Nor is there any dispute that [the affirmative obligation fully to dismantle dual systems] applies to [Mississippi's] higher education system").

Second, contrary to the panel's standard that presumed the illegality of the State's remedies, when a State has maintained a *de jure* school system, it is presumed that current racial imbalances are causally related to the prior segregation, and the party contesting the causal relationship bears the heavy burden of proving otherwise. See *id.* at 2741 ("*Brown* and its progeny . . . established that

the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system"); *Dayton II*, 443 U.S. at 537 (1979); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 459-61 (1979); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 210 (1973); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971); see also *Freeman*, 112 S. Ct. at 1447 ("The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation").

Third, race-conscious remedies typically are required to remedy racially discriminatory policies and conduct by the State. *Fordice*, 112 S. Ct. at 2736 ("We do not agree . . . that the adoption and implementation of race-neutral policies alone suffice to demonstrate that the State has completely abandoned its prior dual system"); *Swann*, 402 U.S. at 25 ("Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations"); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971) ("Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy"). Thus, race-based policies must be evaluated in light of the state actor's affirmative duty to eliminate the effects of *de jure* discrimination and its record of pursuing other remedies. Given the State's *affirmative obligation* to take remedial action, courts must grant states latitude "to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U.S. at 15-16.

Pursuant to the desegregation precedent applicable to this case, the correct analysis is not that applied in *Croson* and *Wygant*, which did not involve any proven violations of law or an established history of official segregation and discrimination. Under this Court's de-

segregation cases, the onus is on former *de jure* school systems to identify and eradicate all vestiges of their prior systems, as well as to eliminate policies that could perpetuate the dual system or impede the attainment of unitary status. *Fordice*, 112 S. Ct. at 2735; *Dayton II*, 443 U.S. at 538. The ultimate measure of the State's compliance with its constitutional obligations "is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Id.* Accordingly, race-conscious remedies must be implemented if they are necessary "to repair the denial of a constitutional right." *Swann*, 402 U.S. at 15-16.

The foregoing principles must be taken into account by courts that are evaluating the purpose and effectiveness of remedies adopted by school systems to eliminate vestiges of segregation. School authorities attempting to meet their constitutional obligation should be accorded deference in crafting remedies, particularly when previous remedies have proven unsuccessful. The dismantling of dual systems is a complex process that may involve some trial and error, but such systems are constitutionally mandated to keep searching for effective remedies until they have achieved unitary status, and must be given the flexibility to do so.

In sum, the panel's error was in ignoring the historical context in which UMCP adopted its race-conscious policies and the pronouncements of this Court with respect to prior *de jure* school systems. Those pronouncements make clear that such school systems are under affirmative obligations to take remedial action that distinguish them from state actors that adopt affirmative action policies on a purely voluntary basis outside the context of prior systemic segregation. The panel's failure to recognize this distinction leaves both courts and state actors without proper guidance as to the legal standards in this area.

II. THE PANEL'S APPLICATION OF THE WRONG LEGAL STANDARD, AND ITS FAILURE TO CONSIDER THE HISTORICAL CONTEXT WHEN EVALUATING THE FACTS, CAUSED ITS ANALYSIS TO BE WHOLLY INCONSISTENT WITH THIS COURT'S SCHOOL DESEGREGATION CASES.

The Fourth Circuit's opinion powerfully illustrates the anomalous and erroneous conclusions that can result from a mechanical application of *Croson* and *Wygant*, as opposed to the principles that undergird the school desegregation cases. If the opinion is allowed to stand, lower courts and state actors, particularly former *de jure* school systems, will face conflicting guidance as to the legal standards that govern judicial review of efforts to dismantle segregated school systems.

A. The Panel's Application Of The "Compelling Interest" Analysis Was Erroneous.

Although the panel ultimately held that there were material factual disputes on the "compelling interest" issue that could not be resolved without a trial, *Podberesky* v. *Kirwan*, 38 F.3d 147, 157 (4th Cir. 1994) (J.A. 18a), the panel's analysis contains fundamental legal errors that are the direct result of its failure to apply the correct legal standard and to consider the historical events that led to UMCP's adoption of the Banneker scholarship program. Indeed, the compelling interest standard effectively is inapposite to dual systems with an affirmative constitutional duty to desegregate. See *United States* v. *Paradise*, 480 U.S. 149, 167 (1987) ("The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor"). The affirmative duty to dismantle its unlawful system dictates that the State employ race-conscious remedies as necessary to disestablish dual systems and their effects.

The panel's analysis is devoid of any recognition of either the legacy of the dual system in Maryland or the

State's efforts to address the administrative findings of a continuing constitutional violation. In light of the history of segregated education in Maryland and the uncontested administrative findings, the existence of an affirmative duty to act in this case is clear. Only by viewing the State's proffered justifications in isolation from history and the applicable standards under the desegregation cases could the panel have concluded otherwise. Thus, the panel's opinion is irreconcilable with the Court's school desegregation decisions.

The panel's analysis contains three serious errors. *First*, when a State has maintained a *de jure* segregated school system, it is presumed that current racial imbalances or inequities are causally related to the prior segregation. See *supra* at 9-10. In this case, the State does not contest this presumption in relation to the four factors. Yet, to the extent that it viewed the University as carrying a burden to demonstrate that the present effects were causally related to its prior conduct, the panel's analysis directly conflicts with this standard.

Second, the panel's conclusion that UMCP's poor reputation in the African-American community and racial hostility on campus are irrelevant *as a matter of law* flies in the face of this Court's school desegregation decisions, which have recognized that "[i]n a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors." *Fordice*, 112 S. Ct. at 2736. Indeed, the panel's decision trivializes the impact upon real people, particularly young students, of the legacy of a dual system that this Court has held must be remedied. The record in this case establishes real and justified negative perceptions of the University by African-Americans as a result of over a century of *de jure* segregation and decades of resistance by the State to its constitutional duty to eradicate the dual education system.

With respect to UMCP's poor reputation in the African-American community, the panel dismissed this justification out of hand, concluding that "mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy." 38 F.3d at 154 (J.A. 10a). Yet this Court and others consistently have recognized that poor community reputation is a significant vestige of discrimination and a direct result of state resistance to eliminating the legacy of segregation that must be remedied in the course of attaining a unitary system. See *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1446 (1992) (in determining whether a school system has been desegregated, courts must examine "whether the school district has demonstrated, to the public and to the parents and the students of the once disfavored race, its good faith commitment" to nondiscrimination); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 196 (1973) (in determining whether a school is segregated, a court should examine "the community and administration attitudes toward the school"); *United States* v. *Board of Sch. Comm'rs*, 506 F. Supp. 657, 673 (S.D. Ind. 1979), *vacated in part on other grounds*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980) (ordering school-community relations program as part of desegregation plan); see also *Morrow* v. *Crisler*, 491 F.2d 1053, 1056 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974) ("The reputation of the [Mississippi Highway] Patrol in the black community as a discriminatory employer has posed a formidable obstacle to the achievement of a Patrol which has eradicated all of the effects of past discriminatory practices"; ordering additional recruitment measures "to insure that black applicants will be attracted to the force"). In short, the panel's conclusion that poor reputation is irrelevant *as a matter of law* simply cannot be squared with this Court's precedent and reveals a striking disregard of the real-world effects of *de jure* segregation and the difficulty of eradicating them.

The panel's conclusion with respect to the State's findings of a hostile climate is equally erroneous. The panel acknowledged that evidence in the record established the existence of racial incidents on the campus, but concluded that the hostile climate did "not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination." 38 F.3d at 154 (J.A. 11a). Again, however, this Court has recognized that a racially hostile learning climate is often a consequence of past segregation and that it must be remedied in order for students of all races to be willing to attend previously single-race schools. See *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 641 (1950) (mere admission is not enough to meet the mandates of the Fourteenth Amendment; a graduate student is still denied Equal Protection if the student is placed in a hostile environment which affects his "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession"); *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950) ("[t]he law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts"). Lower courts likewise have recognized that the effects of a hostile environment necessarily perpetuate the dual system and must be remedied. *Knight* v. *Alabama*, 14 F.3d 1534, 1553 (11th Cir. 1994); *Evans* v. *Buchanan*, 582 F.2d 750, 772 (3d Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923 (1980) (adopting human relations program to prevent racial myths and stereotyping). The panel's implausible conclusion that the proven campus problems at UMCP have no nexus to the prior segregation and cannot, as a matter of law, be affirmatively remedied, simply ignores this precedent.

Third, the panel's analysis of the State's reliance on the underrepresentation of African-American students at the University and lower graduation and retention rates

for these students further illustrates its wrongful application of *Croson* and *Wygant*. While the panel held that there are material issues of fact that should have precluded summary judgment on these issues, 38 F.3d at 156 (J.A. 18a), it again failed to apply the long-standing principle that where a school system formerly was segregated by law, current racial imbalances are *presumed* to be causally related to the prior *de jure* system, and a party disputing the causal relationship bears a heavy burden of proof. See *supra* at 9-10.

Instead, the panel not only effectively placed the burden of proof on the University, but required elimination of other potential causes, holding that "the reference pool must factor out, to the extent practicable, all nontrivial, non-race-based disparities in order to permit an inference that such, if any, racial considerations contributed to the remaining disparity." *Id.* at 160 (J.A. 24a). *By reversing* the presumption of causation established by this Court's school desegregation decisions, the panel was able to analyze the statistical evidence in a historical vacuum, thereby rendering the State's egregious history of segregation irrelevant and creating issues of fact where none exist. By heightening this burden of proof to extend to isolating and disproving any other potential causal factors, the panel further erred under *Bazemore* v. *Friday*, 478 U.S. 385 (1986).

B. The Panel's Application Of The "Narrow Tailoring" Analysis Also Was Erroneous.

The panel's application of the "narrow tailoring" analysis also reflects its failure to apply the correct legal standard. Because the panel did not correctly identify the appropriate objectives of remedial action—*e.g.*, to dismantle the remaining vestiges of segregation—its analysis of whether the State's remedies are "narrowly tailored" to these objectives is erroneous. By failing to appreciate the complex lingering effects of the prior dual education

system, the panel failed to understand why the Banneker scholarship program is in fact necessary to eradicate those effects.

1. *High-achieving African-American Students.*

Pursuing an erroneous analysis under the wrong standard, the panel concluded that the scholarship program is not "narrowly tailored" to its remedial goals of attracting and graduating more African-American students to the campus and curing the reputation and hostile climate problems because "[h]igh achievers, whether African-American or not, are not the group against which the University discriminated in the past." *Id.* at 158 (J.A. 20a).

This stunning conclusion ignores Maryland's *de jure* history and the stated purposes of the scholarship program. Under Maryland's dual system, all African-Americans, including high-achieving African-American students, were excluded from the University. Indeed, the African-Americans excluded by the *de jure* system were those high-achieving students who, but for the racial qualification, satisfied the University's admissions criteria. Hence, the Banneker program focuses on enrolling the type of students that directly were excluded by the *de jure* system and is therefore designed to remedy the exclusion of past discrimination.

Furthermore, the ultimate purpose of the scholarship program is not just effectively to enroll high-achieving African-American students, but rather to make the University more attractive and hospitable to *all* African-American students. As the district court recognized, the Banneker program will break down racial stereotypes, establish a strong alumni base, and provide role models for all African-American students. *Podberesky* v. *Kirwan*, 838 F. Supp. 1075, 1094-95 (D. Md. 1993) (J.A. 82a-83a). In this way, the Banneker program contributes to the

elimination of all four of the identified vestiges of discrimination.

The panel's simplistic and erroneous analysis failed to recognize the scholarship program's broader purposes. More generally, the panel failed to appreciate that the legacy of state-sanctioned segregation is complex and that eliminating all of the effects is a difficult task calling for creative, long-term solutions. As the district court recognized, the University carefully considered alternative scholarship programs and adopted the Banneker program only after concluding that the alternatives "would not be nearly as effective in remedying the problems that continue to exist." *Id.* at 1095 (J.A. 83a). Indeed, the current version of the Banneker program was implemented only after the University tried a scholarship program that was open to all minority students, and found that the program was not successful in remedying the injury to African-American students. *Id.* at 1081 n.41 (J.A. 48a). Thus, the Banneker program is a good-faith effort by the State to implement an effective remedy to address the State's continuing constitutional violation. Only under the panel's misguided and contrived analysis could it be characterized otherwise.

2. *Including Non-Residents Of Maryland.*

The panel also concluded that the scholarship program is not "narrowly tailored" because it is open to non-Maryland residents. 38 F.3d at 158-59 (J.A. 20a-21a). Again, this conclusion is misguided and erroneous. Under the dual system, all African-American students, both residents and non-residents of Maryland, were excluded from the University. The four factors the State has identified as remnants of past discrimination that require remedial action apply equally to residents and non-residents. Thus, making scholarships available to non-residents is essential to remedy the injury incurred. Indeed, the scholarship program for African-American students is precisely tar-

geted at the group that formerly was excluded from the University.

Again, the panel's analysis was wrong, with the result that it struck down a program that had significant promise of bringing the State into compliance with the Constitution without significant impact on non-African American students.

* * * *

By ignoring nearly half a century of this Court's jurisprudence, the Fourth Circuit's decision below threatens to terminate the uncompleted and sorely needed efforts of former *de jure* segregated school systems to eradicate the effects of their prior conduct. This Court should grant the petitions and reaffirm the importance and centrality of the States' continuing affirmative obligation to remedy the vestiges of segregation.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

MICHAEL A. COOPER, Co-Chair
HERBERT J. HANSELL, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
PACE J. MCCONKIE
1450 G Street, NW, Suite 400
Washington, DC 20005
(202) 662-8600

GEORGE W. JONES, JR.*
MARK E. HADDAD
JACQUELINE GERSON
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, DC 20006
(202) 736-8000

* Counsel of Record

Attorneys for Amicus Curiae
The Lawyers' Committee For Civil Rights Under Law

LOUIS M. BOGRAD
122 Maryland Avenue, NE
Washington, DC 20002
(202) 544-1681
Attorney for Amicus Curiae American Civil Liberties Union Foundation

SANDRA DEL VALLE
99 Hudson Street
New York, NY 10013
(212) 219-3360
Attorney for Amicus Curiae Puerto Rican Legal Defense & Education Fund, Inc.

DENNIS COURTLAND HAYES
General Counsel
WILLIE ABRAMS
Asst. General Counsel
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 486-9191
Attorneys for Amicus Curiae National Association for the Advancement of Colored People

SUSAN GOERING
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555
Attorney for Amicus Curiae American Civil Liberties Union Foundation of Maryland

FERNANDO OLGUIN
ANTONIA HERNANDEZ
634 S. Spring St., 11th Fl.
Los Angeles, CA 90014
(213) 629-2512
Attorneys for Amicus Curiae Mexican American Legal Defense and Educational Fund, Inc.

FARNEFE N. HAYNES
General Counsel
WILLIAM A. BLAKEY
Washington Counsel
8260 Willow Oaks Corporate Drive
Fairfax, VA 22031
(703) 205-3544
Attorneys for Amicus Curiae The United Negro College Fund

May 1, 1995

Supreme Court, U.S.
MAY 1 1995
OFFICE OF THE CLERK

Nos. 94-1620 and 94-1621

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. KIRWAN, PRESIDENT, UNIVERSITY OF MARYLAND AT COLLEGE PARK, ET AL.,
PETITIONERS

v.

DANIEL J. PODBERESKY

MONICA GREENE, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

DAVID K. FLYNN
LESLIE A. SIMON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether respondent was entitled to summary judgment on his equal protection challenge to a merit-based scholarship program for black students established by the University of Maryland, College Park, to remedy the current effects of its past *de jure* racial segregation and other racially discriminatory practices.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Discussion	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Board of Education v. *Dowell*, 498 U.S. 237 (1991)	12
Brown v. *Board of Education*:	
347 U.S. 483 (1954)	4
349 U.S. 294 (1955)	12
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989)	14, 15, 17
Green v. *County School Board*, 391 U.S. 430 (1968)	12
Keyes v. *School District No. 1*, 413 U.S. 189 (1973)	12
Mandel v. *HEW*, 411 F. Supp. 542 (D. Md. 1976), aff'd by equally divided court *sub nom. Mayor of Baltimore* v. *Mathews*, 571 F.2d 1273 (4th Cir.), cert. denied, 439 U.S. 862 (1978)	5
McLaurin v. *Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)	3
Plessy v. *Ferguson*, 163 U.S. 537 (1896)	3
Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978)	17
Sweatt v. *Painter*, 339 U.S. 629 (1950)	3
United States v. *Fordice*, 112 S. Ct. 2727 (1992)	7, 12, 13, 16
United States v. *Louisiana*, No. 80-3300 (E.D. La. Nov. 14, 1994)	18
Wygant v. *Jackson Board of Education*, 476 U.S. 267 (1986)	13, 14, 15, 19

Constitution, statutes and regulations:	Page
U.S. Const. Amend. XIV	7
Equal Protection Clause	7
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.*	2, 4, 7, 11
42 U.S.C. 2000d-1	2, 17
34 C.F.R.:	
Pt. 100	2
Section 100.3(b) (6) (i)	13, 17
Section 100.3(b) (6) (ii)	17
Section 100.5(h)	17
Miscellaneous:	
56 Fed. Reg. 64,549 (1991)	17
Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756-8764 (1994)	3, 16
p. 8761	16
p. 8762	17, 19
Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271-4272 (1994)	13
Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658-6664 (1978)	13, 16

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1620

WILLIAM E. KIRWAN, PRESIDENT, UNIVERSITY OF MARYLAND AT COLLEGE PARK, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

No. 94-1621

MONICA GREENE, ET AL., PETITIONERS

v.

DANIEL J. PODBERESKY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the constitutional validity of the Benjamin Banneker Scholarship Program (Banneker program), a scholarship program established for black students by the University of Maryland, College Park (UMCP). The Banneker program was included in the system-wide desegregation plan submitted by the University to the United States Department of Education, Office for Civil Rights (OCR), in 1985 in an attempt to remedy the continuing effects of its past discrimination. The University once served as the all-white flagship institution in the Maryland

higher education system, a system that was segregated as a matter of law until the mid 1950s, and as a matter of practice until the late 1970s. The court of appeals ruled that the Banneker program was unconstitutional.

The United States Department of Education has primary responsibility for the administrative enforcement of civil rights laws affecting educational institutions, including Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance such as UMCP. OCR has played an active role since 1969 in federal efforts to eliminate the vestiges of Maryland's past lawfully mandated racial segregation in higher education.

The United States notified UMCP in 1969 that its higher education system remained segregated and that it had a legal responsibility to dismantle that segregated system. During the subsequent 16 years, OCR and the State of Maryland worked together, sometimes amicably and other times adversarily, to formulate a system-wide desegregation plan. The plan that was finally adopted in 1985 included efforts, like the Banneker program, to recruit students of other races to attend formerly all-black and all-white institutions. The United States participated in this case in the district court and the court of appeals as amicus curiae in support of the constitutionality of the Banneker scholarship program.

The United States Department of Justice is currently involved in litigation concerning desegregation of systems of higher education in Mississippi, Louisiana, and Alabama. Those cases arose upon referral from the Department of Education after the States refused to comply voluntarily with Title VI. See 42 U.S.C. 2000d-1. A recently entered consent decree in the Louisiana case contains provisions requiring the State to establish race-targeted scholarships as one means of meeting its obligation to desegregate its system of higher education. The Department of Education has long-standing regulations interpreting Title VI. See 34 C.F.R. Pt. 100. It also

recently issued a policy guidance on the application of Title VI to race-targeted student financial aid. See 59 Fed. Reg. 8756-8764 (1994). The United States has an interest in the availability of minority-targeted financial aid as one permissible means to remedy past unconstitutional discrimination by state colleges and universities; it also has an interest in the development of appropriate legal standards for evaluating such remedies.

STATEMENT

1. This case is a challenge to a scholarship program for black students at the University of Maryland, College Park (UMCP), that was part of UMCP's plan to eliminate the lasting vestiges of its past unconstitutional discrimination against blacks. UMCP has a long history of intentional racial discrimination. Throughout the first half of this century, UMCP was mandated by state law to be an all-white institution as part of the *de jure* racial segregation of the Maryland higher education system. Black students could attend only the four all-black colleges in the State, colleges that were "vastly underfunded and consistently neglected." Pet. App. 36a, 99a & n.3. When there was pressure to address the inequities of the racially segregated system in order to comply with the separate-but-equal rule of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), Maryland chose instead to pay for blacks to leave the State to attend graduate school rather than to integrate or equalize its own institutions. Interv. Summ. J. Mot. Exh. 5, at 93-95. In 1949, the President of UMCP recommended that UMCP be privatized rather than allow black graduate students to enroll there. Pet. App. 37a-38a.

After this Court ruled that graduate schools in two other States were required to admit blacks (see *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950)), UMCP admitted its first black graduate student in 1951. Pet. App. 38a. University of Maryland officials,

however, did not vote to remove the legal bar to black enrollment until after this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Pet. App. 38a. The racial segregation of the system continued for approximately 20 years thereafter. *Id.* at 11a. During this period, UMCP effectively excluded black students from the all-white school by establishing new and more stringent admission standards, requiring standardized testing, resisting dormitory integration, preserving the all-white character of UMCP by considering only other all-white schools for inclusion in an expansion plan, and by taking no steps to recruit black students or to integrate its campus. *Id.* at 38a-40a. In 1969, UMCP remained 99% white. *Id.* at 40a.

In 1968, the Office for Civil Rights (OCR) of the United States Department of Health, Education and Welfare (the predecessor of the Department of Education) began its efforts to compel Maryland to desegregate its higher education system. OCR found that the Maryland higher education system remained racially segregated and informed Maryland of its duty to dismantle the system in order to meet its obligations under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Pet. App. 41a. During the course of the next several years, Maryland submitted desegregation plans that OCR rejected as ineffectual. Maryland continued to neglect black students, including failing to increase financial aid expenditures to meet needs of black students from low or moderate income families or to provide adequate housing for blacks, and demonstrated continued hostility toward recruitment of black students. *Id.* at 41a-44a. After OCR accepted a desegregation plan in 1974, Maryland "repeatedly failed to act in a manner which would indicate that it [was] executing the Plan promptly and vigorously." *Id.* at 45a.

OCR advised Maryland in 1975 that it was preparing to commence formal enforcement proceedings. In response, Maryland obtained an injunction ordering OCR to seek voluntary compliance before it initiated enforce-

ment proceedings. See Pet. App. 111a; *Mandel* v. *HEW*, 411 F. Supp. 542, 550 (D. Md. 1976), aff'd by equally divided court *sub nom. Mayor of Baltimore* v. *Mathews*, 571 F.2d 1273 (4th Cir.) (en banc), cert. denied, 439 U.S. 862 (1978). Ultimately, after years of negotiation and litigation during which the State continued to take actions that hindered desegregation (see Pet. App. 46a-47a), Maryland submitted a desegregation plan for 1980-1984. OCR found the plan inadequate, analyzed the deficiencies and provided guidance regarding the steps necessary to bring Maryland into full compliance with Title VI. *Id.* at 46a. OCR specified that Maryland needed to address the disparity between the black and white rates of admission at the traditionally all-white institutions, including UMCP.

Maryland submitted another plan for 1985-1989, one component of which was the provision of "other-race" financial aid at both traditionally white and traditionally black institutions to attract students of other races to those institutions and thereby reduce their continuing racial identifiability, a vestige of the *de jure* segregated system. Pet. App. 47a-49a. As required by OCR, UMCP submitted a separate institutional plan which included the Benjamin Banneker Scholarship Program as one of the means by which UMCP intended to reduce its racial identifiability as an all-white institution. *Id.* at 48a-49a, 111a-112a. The Banneker program, established in 1978 as part of Maryland's effort to achieve Title VI compliance, provided merit-based scholarships to minority students at UMCP. *Id.* at 111a, 127a-128a & n.10. In response to UMCP's plan, OCR recommended increased recruitment efforts and an increase in the number and amount of merit-based scholarships for black students. *Id.* at 127a n.10. OCR accepted Maryland's 1985-1989 plan as "compliance with Title VI for the life of the plan." *Id.* at 48a. Maryland indicated that it intended to continue to follow the plan at least until completion of the OCR review. *Id.* at 48a-49a. From 1985 to 1989, Mary-

land provided more than $7,900,000 worth of "other-race" financial assistance to students pursuant to the plan, approximately $2,400,000 at historically black schools and $5,500,000 at other institutions. See Gov't D. Ct. Br., App. C.

Based upon its experience with the Banneker program during the preceding ten years and an evaluation of its effectiveness, Maryland refined the program in 1988 by increasing the amount of assistance to full four-year scholarships for tuition, room and board; at the same time it narrowed the eligible applicant pool to black students. Pet. App. 47a-48a & n.41, 98a-99a. UMCP did not set an exact number of Banneker scholarships to be awarded, although its practice was to award at least 20 Banneker scholarships annually. *Id.* at 48a, 98a, 132a. Nonetheless, the Banneker program accounted for only approximately one percent of UMCP's annual financial aid budget. *Id.* at 35a-36a, 87a & n.76.

All students, irrespective of race, could compete for scholarships with identical benefits under Maryland's Francis Scott Key Scholars Program (Key program), which awarded approximately twice as many scholarships as the Banneker program. Pet. App. 5a, 83a, 99a n.2.[1] The academic credentials required to be eligible for the Key program were somewhat more rigorous than the Banneker program. *Ibid.* In 1990, the year respondent entered UMCP, black students received two of the 52 Key scholarships awarded. *Id.* at 83a.

Only since the late 1980s has Maryland made "any genuine progress towards eliminating its single race status"; this progress has been the result in part of the Banneker program. Pet. App. 49a, 130a.[2] When this suit was

---

[1] Respondent also challenged the validity of the Key program but the court rejected that challenge, Pet. App. 134a-137a, and respondent no longer pursues that claim.

[2] The district court noted that it took UMCP "from 1975 to 1983 to increase its black enrollment from 6.8% to 8.1%. Later in the

filed in 1990, the UMCP student population was 11.2% black. *Ibid.* OCR currently is in the process of determining whether Maryland's implementation of its system-wide desegregation plan has eliminated the vestiges of the *de jure* system of racial discrimination in accordance with the standard set forth in *United States* v. *Fordice*, 112 S. Ct. 2727 (1992). Pet. App. 48a, 111a.

At the time he filed this lawsuit in 1990, respondent was a 19-year-old male of Hispanic descent who had been granted admission to UMCP in 1989 to enter as part of the freshman class in the fall of 1990. He was found to be ineligible to receive a Banneker scholarship because he is not black. Pet. App. 99a. He was not eligible for a Key scholarship because he did not have adequate academic credentials. *Id.* at 5a, 134a. Respondent filed this lawsuit against UMCP, alleging that the Banneker scholarship program violated, *inter alia*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Fourteenth Amendment. Pet. App. 97a.

2. The district court examined the Banneker program to determine whether it survived a strict scrutiny analysis under the Equal Protection Clause.[3] The court entered summary judgment for defendants based on its conclusion that there was a strong basis in evidence that remedial action was necessary in light of the administrative findings of OCR and that the program served a compelling government interest and was narrowly tailored to achieve that goal. Pet. App. 109a-137a.

3. The court of appeals reversed, concluding that the district court needed to make specific findings about whether there was a sufficient present effect of UMCP's

---

decade, the same 1.3% increase took only two years—between 1988 and 1990 the percentage of black undergraduates increased from 9.9% to 11.2%." Pet. App. 49a n.44.

[3] The court noted that Title VI standards are coextensive with those of the Fourteenth Amendment. Pet. App. 121a; see also *Fordice*, 112 S. Ct. at 2738 n.7 ("the reach of Title VI's protection extends no further than the Fourteenth Amendment").

past racial discrimination against blacks to justify maintenance of the race-based Banneker scholarship program. Pet. App. 96a-108a.

4. On remand, several black students at UMCP who had received Banneker scholarships and their parents were permitted to intervene as defendants. Pet. App. 35a n.2. UMCP conducted an extensive administrative review of the Banneker program to determine whether to continue the program and invited participation in that review by all parties to the litigation. In a 1993 Decision and Report (*reproduced at* Pet. App. 139a-220a), UMCP concluded that "the Banneker Program is a highly effective means for countering significant lingering effects of the University's historical identity as a discriminatory institution." *Id.* at 220a. It found that the program "also supports the University's efforts to create and sustain the diverse campus community identified as essential to providing a high-quality education." *Ibid.* UMCP concluded that continuing effects of the racially discriminatory dual system persisted at UMCP and influenced enrollment decisions of black students and that the Banneker Program was necessary to remedy those continuing effects.

The district court allowed additional discovery, received cross-motions for summary judgment based on extensive evidence including the 1993 University report, and made detailed factual findings. The court ruled that UMCP had presented a strong evidentiary basis showing four present effects of past racial discrimination: (1) UMCP has a poor reputation within the African-American community, particularly among parents and counselors who influence students' college choices; (2) African-Americans are underrepresented in the UMCP student population; (3) African-American students at UMCP have low retention and graduation rates; and (4) the UMCP campus atmosphere is perceived as hostile to African-American students. Pet. App. 50a-81a. The court cited evidence of, for example, first-hand accounts of current students who were urged not to attend UMCP because of its racially discrim-

inatory environment; statistical evidence of underrepresentation and attrition rates; and survey evidence regarding racially hostile campus environment, including, for example, separate homecomings for whites and blacks. The court concluded that remedial action to redress the prior racial discrimination remained necessary at the time respondent applied for a scholarship and that the Banneker program was narrowly tailored to remedy the effects. *Id.* at 81a-89a. The court entered summary judgment for petitioners and denied respondent's summary judgment motion.

5. The court of appeals reversed the district court's grant of summary judgment for petitioners and ordered that summary judgment be entered for respondent. The court ruled that, because the Banneker scholarship program excluded other races, UMCP was "burdened with a presumption" that the program could not be sustained. Pet. App. 6a. It held that, in order for present effects of discrimination to justify the program, petitioners had to "prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." *Id.* at 9a.

The court of appeals concluded that two of the present effects of past discrimination found by the district court—UMCP's poor reputation in the African-American community and the racially hostile campus environment—were not sufficient to justify the Banneker program. Pet. App. 10a. It believed that the poor reputation constituted "mere knowledge of historical fact[s]" of UMCP's prior discrimination and that is "not the kind of present effect that can justify a race-exclusive remedy." *Ibid.* The court rejected the district court's conclusion that the racially hostile UMCP campus environment was connected to UMCP's past discrimination. It reasoned that the incidents "do not necessarily implicate past discrimination on the part of the University, as opposed to present societal discrimination." *Id.* at 11a.

With regard to the remaining two effects relied upon by the district court, the court of appeals held that they also could not justify the district court's decision. As for the district court's findings of strong evidence of low retention and graduation rates among African-Americans, the court of appeals ruled that genuine issues existed, including dispute as to the reason why African-Americans leave UMCP in greater numbers than other students. Pet. App. 14a. With regard to underrepresentation of African-Americans among entering students, the court believed there were remaining factual disputes about UMCP's minimum admission criteria and the relevant applicant pool. *Id.* at 15a-18a.

Rather than remanding the case to the district court for trial to resolve those factual disputes, the court of appeals ordered that summary judgment be granted to respondent. The court ruled that, even assuming the validity of the proffered justifications of racial underrepresentation and higher attrition rates related to past discrimination, the Banneker program was unlawful because it was not narrowly tailored to remedy those two effects. The court noted that the narrowly tailored determination was difficult to make because "the proof of present effects is so weak." Pet. App. 19a. The court found that the Banneker program effectively recruited only high-achieving African-Americans and high achievers were not the group against which UMCP had discriminated in the past. *Id.* at 20a. The court also ruled that because Banneker scholarship recipients included African-Americans who are not residents of the State of Maryland, the program was not narrowly tailored to the identified problem of not enough qualified African-American Maryland residents attending UMCP. The court found that UMCP's underrepresentation statistics failed to account for various factors and therefore led more to racial balancing than to a tailored remedy program. *Id.* at 25a. The court also found that

UMCP had not shown that it had tried any race-neutral solutions to address the retention problem. The court of appeals ordered that, on remand, the district court enter an order denying petitioners' summary judgment motion, grant respondent's summary judgment motion, and re-examine respondent's scholarship eligibility. *Id.* at 28a-29a.

In considering timely rehearing petitions, the court of appeals modified its opinion in one minor respect and denied rehearing en banc over the dissent of three judges.

DISCUSSION

The ruling in this case severely impedes the ongoing efforts of the United States Department of Education's Office for Civil Rights (OCR) to eliminate the vestiges of *de jure* segregation in state systems of higher education subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* The court of appeals held that a state institution with a long and undisputed history of both *de jure* racial segregation and intentional racial discrimination may not implement, as part of an OCR-approved desegregation plan, a scholarship program to recruit and retain black students. In reaching this decision, the court of appeals incorrectly presumed that the program was invalid unless the University of Maryland, College Park (UMCP), could prove that the current racial disparities related solely to its own past discrimination, disregarded the presumption that the racial disparities in formerly *de jure* segregated education systems are related to that past segregation until proven otherwise, ignored the fact that UMCP's creation of the program was prompted by OCR's finding that it was in violation of Title VI and insistence that it take this type of remedial action, and overlooked the narrowly tailored features of the program. If left unreviewed, the decision will cause substantial confusion regarding the legal and constitutional standards

applicable to scholarship programs established by institutions attempting to remedy racial discrimination, and will also create doubt about the validity of the Department of Education's current policy guidance regarding such scholarships.

1. The court of appeals' opinion is inconsistent with the principle, recently reaffirmed by the Court in *United States* v. *Fordice*, 112 S. Ct. 2727, 2732, 2736-2737 (1992), that States that operated *de jure* racially segregated school systems have an affirmative duty to dismantle the systems and their vestiges. Under the Court's precedents, the burden is on a State to prove that it has dismantled its previously *de jure* segregated school system. *Fordice*, 112 S. Ct. at 2741; *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955). This burden is not satisfied by adoption of race-neutral policies when practices traceable to prior illegal discrimination have continuing segregative effects.

As the district court below recognized, this Court has created "aggressive affirmative duties in the area of primary and secondary school desegregation * * * and a presumption that the effects of the [previously unconstitutional] segregation continue until a court finds otherwise." Pet. App. 89a-90a, citing *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Board of Education* v. *Dowell*, 498 U.S. 237 (1991). In *Fordice*, the Court also indicated that, in determining whether current effects are related to prior unconstitutional discrimination, courts should find that they are unless it is proven otherwise. 112 S. Ct. at 2741 (rejecting district court's holding that the private plaintiffs and the United States had not established the constitutional defect of a current state policy because it "improperly shifted the burden away from the State"). The unique features of long-standing *de jure* segregation in public education, including its entrenched nature and system-wide impact, justify the presumption

that current racial disparities are traceable to formerly *de jure* segregation and the placement of the burden on a challenging party to prove otherwise. Cf. *id.* at 2745 (Thomas, J., concurring) (approving assumption that a current school policy reflects discriminatory intent if policy initially tainted and produces segregative effects).

OCR's policy similarly places upon States with a history of *de jure* segregation in their higher education system an affirmative duty under Title VI to ensure that no vestiges of those *de jure* systems continue to have a discriminatory racial effect. See Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658-6664 (1978). The Department of Education thus has long required that a recipient of federal funds that has discriminated in the past "must take affirmative action to overcome the effects of prior discrimination." 34 C.F.R. 100.3(b)(6)(i). Following *Fordice*, the Department reaffirmed that standard and announced to States with pending Title VI evaluations that OCR will apply *Fordice* to require elimination of all vestiges of prior systemic *de jure* segregation. Notice of Application of Supreme Court Decision, 59 Fed. Reg. 4271-4272 (1994).

The court of appeals' decision in this case conflicts with those principles. Instead of viewing current racial disparities as traceable to past *de jure* segregation in the absence of contrary evidence, the court instead utilized a "presumption" that action to remedy those disparities was not justified unless UMCP affirmatively proved that current conditions were traceable to its past unconstitutional discrimination. Pet. App. 6a. The court, in effect, imposed an evidentiary presumption that current racial disparities at UMCP are traceable exclusively to general societal discrimination.

The court of appeals' presumption is also inconsistent with the reasoning of the Court in both *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 277 (1986)

(opinion of Powell, J.), and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The Court there recognized that, where a governmental entity is attempting to remedy past discrimination and has a strong basis in evidence for doing so, the entity's remedial purpose is valid unless proven otherwise by the plaintiff. Plaintiffs challenging remedial action by a State "continue to bear the ultimate burden of persuading the court that the [government's] evidence d[oes] not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of th[at] evidence [i]s not sufficiently 'narrowly tailored.' Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the [government's] assertedly remedial action based on the statistical evidence was justified." *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 278 (opinion of Powell, J.); see also *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing the remedial action is required."); *Croson*, 488 U.S. at 509 (opinion of O'Connor, J.) (state or local entity may take action to rectify effects of discrimination within its jurisdiction, and inference of discrimination may arise from statistical disparity). Here, of course, the State's reason for acting was even stronger since it sought to remedy the effects of its own prior conduct in administering an intentionally segregated higher education system.

The court of appeals not only erred in locating the evidentiary burden in establishing the validity of a remedial purpose. It also imposed on the State a heavier burden than this Court requires to justify state affirmative action programs in circumstances not involving any demonstrated history of discrimination. In such cases, the Court has required that a State have a "strong basis in evidence" to justify the need for remedial affirmative action. See *Croson*, 488 U.S. at 500; *Wygant*, 476 U.S. at 277 (opinion of Powell, J.). By requiring a state university with a long and undisputed history of discrimination to prove that its continuing racial identifiability and racial disparities are caused solely by its discrimination and not in any part by broader social factors, the court of appeals' decision places a much higher and virtually insurmountable burden of proof on state school systems to justify needed affirmative remedies.

The court of appeals' decision places UMCP and other formerly *de jure* segregated institutions of higher education in an untenable position. On the one hand, they have an affirmative constitutional and Title VI duty to eliminate the vestiges of prior segregation under *Fordice*. For this purpose, those vestiges are presumed to be the result of the prior unconstitutional segregation. If a college or university takes affirmative steps, however, and is challenged by a suit claiming reverse discrimination, it will be held liable unless it can prove affirmatively that the remaining vestiges of segregation were caused exclusively by the school's prior discrimination and not at all by general societal discrimination. Placing a State seeking to remedy its own prior unconstitutional discrimination in this dilemma is completely inconsistent with this Court's remedial jurisprudence. See *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in part and concurring in the judgment) ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent em-

ployment discrimination and liability to nonminorities if affirmative action *is* taken. Where these employers, who are presumably fully aware both of their duty under federal law to respect the rights of *all* their employees and of their potential liability for failing to do so, act on the basis of information which gives them a sufficient basis for concluding that remedial action is necessary, a contemporaneous findings requirement should not be necessary.").

2. The court of appeals' invalidation of UMCP's Banneker scholarship program is inconsistent with the Department of Education's administrative enforcement of Title VI in Maryland and with its application of its current and past policy which recognizes that race-based scholarships may, in some circumstances, be an appropriate part of a program designed to overcome the lingering effects of past discrimination. See Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756-8764 (1994) (policy guidance); Revised Criteria Specifying the Ingredients of Acceptable Plans To Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658-6664 (1978). The Department's policy guidance specifically recognizes the value of race-targeted financial aid as a student recruitment tool, particularly where an institution has a reputation as being inhospitable to minority students. 59 Fed. Reg. 8761 (1994). Scholarship programs function as an incentive to attend a particular university campus both for the recipient and also for others who may see the scholarship program as a sign that the campus is open to the type of person the program targets. Attendance incentives are especially important in higher education because many remedies that have been key components in desegregation plans for elementary and high school education systems, such as student assignment, are not practically feasible in the college or university context. See *Fordice*, 112 S. Ct. at 2744, 2745 (Thomas, J., concurring); *id.* at 2737 n.5.

Scholarships like the Banneker program can, in some circumstances, help reduce the racial identifiability of an institution in ways that cannot easily be duplicated by other means. By attracting qualified minority students to apply and enroll, helping those students to stay through graduation, contributing to a strong minority alumni base, and demonstrating that a traditionally white school is interested in minority students, the scholarships address some of the more intractable effects of past discrimination. Minority-targeted scholarships like the Banneker scholarships can also increase the level of minority achievement and recognition on campus. 59 Fed. Reg. 8762 (1994).

The court of appeals' decision also fails to recognize the legal significance of the fact that OCR, the federal agency charged with administrative enforcement of Title VI at universities, had found the Maryland system of higher education to be in violation of Title VI. OCR had devoted significant resources over a period of many years to the task of desegregating Maryland's racially segregated system of higher education. In 1985, OCR urged the State to adopt and expand "other-race" scholarship programs that, like the Banneker program, are designed to attract students to state institutions where they have traditionally been absent or underrepresented, thus decreasing the racial identifiability of those institutions.

OCR has the authority to order remedies for UMCP's past discrimination. See 42 U.S.C. 2000d-1; 34 C.F.R. 100.3(b)(6)(i) and (ii), 100.5(h). Its determination that Maryland was not in compliance with Title VI established the "governmental interest in remedying past discrimination." *Croson*, 488 U.S. at 497 (opinion of O'Connor, J.), citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) ("judicial, legislative, or administrative findings of constitutional or statutory violations" trigger remedial interest); see also 56 Fed. Reg. 64,549 (1991). The fact that OCR continued in its efforts to have Maryland adopt

remedial measures during the relevant period reinforces the validity of UMCP's interest.

The court of appeals' decision also undermines Title VI enforcement efforts by the Department of Justice, which has pending higher education litigation in which race-based scholarships may constitute part of an overall remedy. Race-targeted financial aid constitutes an important part of the consent decree in the United States' higher education suit against the State of Louisiana, *United States* v. *Louisiana*, No. 80-3300 (E.D. La. Nov. 14, 1994), and may be a needed component of the remedy in other pending Title VI enforcement actions in Alabama and Mississippi. The decision below interferes with federal enforcement efforts both by placing overly stringent restrictions on an effective remedial device and by penalizing a state institution that was attempting in good faith to comply with a federal mandate.

3. The court of appeals' restrictive analysis of UMCP's power to remedy discrimination made it impossible for the court to make a proper determination as to whether the Banneker program was a narrowly tailored means of achieving that goal. For example, because the court did not consider the possibility that UMCP's long-standing reputation as a "white" school contributed to its difficulty in attracting qualified black applicants, it failed to take into account the program's effectiveness in changing that perception and reducing UMCP's racial identifiability. Nor did the court recognize the importance of attracting highly qualified black students likely to succeed at UMCP and stay through graduation.

Also relevant to the narrow tailoring inquiry is the fact that the Banneker program has a minimal impact on opportunities available to other students. The program does not exclude any student from admission to UMCP and it does not unduly restrict financial aid resources available to other students. The record indicates that the one percent of UMCP's financial aid budget currently

devoted to the Banneker program would otherwise likely be allocated to other desegregation programs, rather than to other scholarships. Pet. App. 87a n.76. Ineligibility for a Banneker scholarship therefore does not impose the burden of achieving racial equality on particular individuals. Cf. *Wygant*, 476 U.S. at 282-283; see also 59 Fed. Reg. 8762 (1994). This fact weighs heavily in the determination whether UMCP's remedial program is narrowly tailored. The court of appeals also disregarded the fact that the Banneker program was not permanent, was susceptible to further refinement as the changes in 1988 evidenced, was subject to periodic review, and was flexible regarding the number of awards made annually.

* * * * *

The Court should grant review in this case in order to correct the court of appeals' erroneous application of a presumption that UMCP's remedial scholarship program was invalid. The judgment of the court of appeals should be vacated and the case remanded for a determination of the validity of the program under the correct constitutional standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

BETH S. BRINKMANN
Assistant to the Solicitor General

DAVID K. FLYNN
LESLIE A. SIMON
Attorneys

MAY 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20068

Supreme Court, U.S.
FILED
MAY 12 1995
CLERK

(9)

No. 94-1620

In the

Supreme Court of the United States

October Term, 1994

WILLIAM E. KIRWAN, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

KEVIN T. BAINE
STEVEN M. FARINA
Williams & Connolly
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
RICHARD A. WEITZNER
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6330

*Counsel of Record

Attorneys for Petitioners

7pp

TABLE OF CONTENTS

Page

REPLY 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES:

Ayers v. Fordice, 1995 U.S. Dist. LEXIS 3467 (N.D.Miss. Mar. 7, 1995) 2

United States v. Fordice, 112 S.Ct. 2727 (1992) 2

REGULATORY PROVISIONS:

56 Fed. Reg. 64548 (1991) 2

No. 94-1620

In the

Supreme Court of the United States

October Term, 1994

WILLIAM E. KIRWAN, *et al.*,

Petitioners,

v.

DANIEL J. PODBERESKY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's brief in opposition underscores the importance of the issues that this case presents and makes several points that warrant a response.

1. Respondent expressly concedes that "hundreds of colleges and universities administer race-based scholarship programs. . . ." Br. at 10. *See also* Brief of *Amici Curiae* American Council on Education, *et al.*, at 7 ("more than 80 percent of institutions surveyed . . . have aid programs for which minority status was a criterion."). He also acknowledges, by his silence, that more than 45,000 students annually benefit from these

programs. *See* 56 Fed. Reg. 64548 (1991). There is no question, therefore, that the issues here have nationwide implications.

2. Respondent's position appears to be that *affirmative* steps may *never* be taken to remedy the effects of past discrimination, even when an official finding of discrimination has been made. "[A] state's only obligation in the area of higher education," respondent argues, "is to eliminate unwarranted 'policies and practices traceable to its prior system that continue to have segregative effects.'" Br. at 15-16 (*quoting United States v. Fordice*, 112 S.Ct. 2727, 2737 (1992)). But *Fordice* did not hold that a State may never take affirmative steps to remedy past discrimination -- or, to put it another way, that the available remedies are limited to eliminating present policies. To be sure, eliminating policies that continue to have segregative effects is required under *Fordice*. In appropriate cases, however, States have the authority not simply to eliminate current practices or policies, but to implement "affirmative steps" to eliminate lasting effects of past discrimination. *Id.* at 2743. Indeed, in *Fordice* itself, the district court on remand not only ordered the elimination of certain practices, but also required the adoption of race-based scholarship programs. *See Ayers v. Fordice*, 1995 U.S. Dist. LEXIS 3467, at *264-65 (N.D.Miss Mar. 7, 1995).

3. The court of appeals did not even consider, much less reverse, the district court's determination that the Banneker Program has no adverse impact on non-black students. Respondent argues, however, that "all UMCP students were substantially burdened by the Banneker Program, since its $1.2 million annual cost came from UMCP funds, funds that are raised in large

measure through student tuition charges." Br. at 23. The district court stated, however, that "if the Banneker Program were discontinued, the funds which it utilizes would not be placed into general scholarship funds but would be channeled into other desegregation programs." (App. 87a n.76.) Respondent also does not disagree, moreover, that Banneker scholarships are awarded after admission decisions are made. (App. 87a.) Thus, as the district court found, a Banneker scholarship has no effect on the admission of any student and so does not give rise to any undue burden. (*Id.*)[1]

4. Respondent acknowledges that the issue whether the Banneker Program serves the compelling interest of attaining a diverse student body raises "important constitutional questions." Br. at 29. He nevertheless states that the diversity issue is not "properly

---

[1] Respondent suggests incorrectly that UMCP has been able to attract as many blacks through a temporary combined Banneker-Key program, in which race is considered as one of several factors in determining scholarship awards, as it was able to recruit under the program that the court of appeals invalidated. *See* Br. at 21 and n.15. As an initial matter, the record contains no information at all about the temporary program that respondent describes, as that program is not being challenged in this case. In any event, significantly fewer blacks have been awarded scholarships under this temporary program in 1995 (19) than those that received Banneker scholarships in 1994 (36). Moreover, while the Banneker Program is tailored to demonstrate "that a traditionally white school is interested in minority students," Brief of the United States as *Amicus Curiae* at 17, and thus has helped UMCP overcome an adverse reputation in the black community and a racially hostile campus climate, the temporary program that respondent discusses accomplishes none of this.

before the Court" because "the Kirwan Petitioners did not seek to defend the Banneker Program based on a 'diversity' rationale" when respondent first sought summary judgment in this case. *Id.* The record demonstrates that this simply is not true.[2] Further, respondent does not dispute that after the remand, the University made explicit findings that the Banneker Program was justified as a measure to promote student diversity. Nor does respondent dispute that the University thereafter proceeded to defend the Banneker Program on diversity grounds both before the district court and the court of appeals. While neither court below addressed the diversity issue on remand, petitioners raised and preserved that issue, and an extensive record exists on which this Court may resolve the question.

---

[2] In fact, citing petitioners' summary judgment memorandum, respondent in the court below specifically stated that the petitioners "argue that the States may still use the Banneker Program 'to eliminate [the effects of] discrimination from their systems of education' *and promote racial diversity*." February 25, 1991 Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Cross Motion for Partial Summary Judgment at 26 (emphasis added). Respondent also conceded that "defendants may conduct carefully constructed and narrowly framed, voluntary affirmative action programs to increase racial diversity at UMCP. . . ." *Id.* at 26-27. In addition, as the court of appeals subsequently noted in *Podberesky I*, the State of Ohio filed an *amicus* brief raising diversity as a separate rationale for the Banneker Program. (App. 103a n.4.)

CONCLUSION

For the reasons stated above and in the Petition, this Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

KEVIN T. BAINE
STEVEN M. FARINA
Williams & Connolly
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
RICHARD A. WEITZNER
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6330

**Counsel of Record*

Attorneys for Petitioners